REPORTS

OF

CASES

PRINCIPALLY ON

PRACTICE AND PLEADING,

DETERMINED

IN

The Court of King's Bench,

IN

HILARY, EASTER, TRINITY, AND MICHAELMAS TERMS,
A. D. 1819.

WITH

COPIOUS NOTES

OF

OTHER IMPORTANT DECISIONS.

By *JOSEPH CHITTY, Esq.*
OF THE MIDDLE TEMPLE, BARRISTER AT LAW

VOL. I.

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ADVERTISEMENT.

The Author has in this Volume completed his intention of publishing a Collection of Decisions respecting the present *Practice* and *Pleading* in the Court of King's Bench (*a*); and which are here arranged, according to the subject matter. Some valuable Decisions of the Court of King's Bench, after the year 1785, and during a time when there were no Reports of the Cases determined in that Court, are also introduced. The latter have been taken from the Paper Books of the late Mr. Justice Ashurst, with the Arguments and Decisions of the Court in the handwriting of that learned Judge; and therefore their accuracy cannot be questioned. A few Notes of the Author have been introduced, and a copious Index concludes the work.

J. CHITTY.

16*th Aug.* 1823.

(*a*) See Advertisement to Vol. I.

PREFACE.

The repeated errors into which persons, even the most intelligent, daily fall, from ignorance of the due course of proceedings in the superior Courts, sufficiently evince the utility of a work collecting the modern decisions upon the subjects of *Practice and Pleading*. A very large portion of the time of the Courts is occupied in discussing subjects of this nature, and the success of a suit depends greatly upon the regularity and accuracy of the proceedings; and when the delay, the expence, and even failure of justice, which frequently take place from inattention to these particulars are considered, a favourable reception of this Work is anticipated, because it is intended to assist in conducting the practitioner through the numerous difficulties he may encounter in prosecuting or defending an action or a criminal proceeding.

Constituted as the Court of King's Bench now is, no time could be more appropriate for such an

undertaking. The conspicuous anxiety to improve the administration of Justice, extends in no small degree to the *practice* of the Court: Reasons are now satisfactorily assigned for decisions upon points which heretofore have been treated as mere practical rules, not to be discussed upon principle; hence the improvement in the modern practice, and the consequent utility of a work collecting and disclosing it to the Profession.

The decided cases are in general reported as faithfully as the Author could state them; and considerable attention has been paid to the notes, which also contain several important decisions, not before in print, and which have been carefully taken and collected by a friend, whose legal knowledge and accuracy render highly valuable any undertaking in which he may have been engaged.

The Work will be continued until a comprehensive collection has been made of those decisions which establish the modern practice of the Court of King's Bench; which it may be justly observed forms the model and example of that practice which in the due administration of Justice ought to be observed by the Courts of this and other countries.

Temple 23d January 1820

TABLE

OF

CASES REPORTED

H

I

J.



CASES

PRINCIPALLY

ON

PRACTICE AND PLEADING,

AND RELATING TO THE

OFFICE OF MAGISTRATES,

DETERMINED

IN

The Court of King's Bench,

IN

Hilary Term,

In the Fifty-ninth Year of the Reign of GEORGE III.

A. D. 1819.

HAYWARD's Bail.—In the Bail Court. (a)

Saturday, Jan. 23d.

Time given to correct a mistake in affidavit of service of notice of justification of bail where bail not opposed. (b)

COMYN moved for leave to amend the affidavit of the service of notice of justifying bail, defendant's name having been spelt by mistake in the title of the

(a) The Court in which bail are justified is now usually holden before one of the Judges of this Court in the Duchy Chamber, under the provision of the 57 *Geo.* 3. *c.* 11. which empowers one of the Judges to sit apart for adding and justifying special bail, whilst others of the Judges are sitting in bank. Formerly by rule, *East.* T. 28 *Geo.* 3. it was prescribed that the Court should sit

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Hayward's Bail.

affidavit *Hewerd* instead of *Hayward;* and the justification of the bail not being opposed,

Best J. who sat in the Bail Court, said, that as the bail were not opposed, the defendant might take two days to give fresh notice and amend the affidavit.

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in *Serjeants' Inn* Hall every morning during term, from half past eight o'clock till ten, for the purpose of taking justification of bail, and hearing motions of course, and discharging insolvent debtors, and that it should adjourn on Mondays, Fridays, and Saturdays, from *Serjeants' Inn* to *Westminster* Hall, to transact the usual business, except the justifying of bail and discharging insolvent debtors, which business was directed to be transacted entirely at *Serjeants' Inn* Hall; and it was ordered that the bail should attend before half past nine, and that if they did not, they should not be permitted to justify. This rule was repealed by a rule, *Trin.* T. 35 *Geo.* 3. ordering that the sittings of the Court in *Serjeants' Inn* Hall should be discontinued; and that the business there transacted should be done in the Court of King's Bench at *Westminster*, where one of the Judges would sit during term time every morning at half past nine o'clock, for the purpose of taking the justification of bail and discharging insolvent debtors; and it was directed that no bail should be permitted to justify after ten o'clock. And by rule *Hil.* 46 *Geo.* 3, it was ordered that the above rule should be *strictly attended to*. On the second day of the present term, the Court (Mr. Justice *Bayley*) directed it to be understood, "That in future bail intended for justification must be in *Westminster* Hall by half past nine o'clock in the morning, and that if the bail were not ready and the papers delivered to counsel by ten o'clock, no bail would be taken after that hour."

(*b*) Further time to justify is in general allowed where an error is discovered in the notice of bail, or notice of justification, or jurat of the bail piece, &c. *Tidd*, 6 ed. 269. *Hill* v. *Roe*, 6 *Taunt.* 532. 2 *Marsh.* 257. S. C. *Simmons's* bail, post 9; *Simmons* v. *Morgan*, post 10; *Webster's* bail, post 10; or where bail are prevented from justifying by circumstances happening after they were put in, as insolvency, *Dixon* v. *Clarke*, post 3; *Ayton's* bail, post 4; bankruptcy, *Anon.* post 11; or, by having given up housekeeping, &c. *Anon.* post 6. Where bail offer themselves and are rejected on account of some personal insufficiency, the Court seldom allow time to add and justify others. *Rawlins's* bail, post 3; *Hunt* v. *Haynes*, post 7. *Per Cur.* 24 *Geo.* 3. *Tidd*, 6 ed. 270. By rule of K B. *Mich.* T. 36 *Geo.* 3. it is ordered, that in all cases where motion is made for further time to justify bail, it must be supported by affidavit of the special fact alleged in excuse of the bail *not attending* at the time mentioned in the notice of justification; or in case further time be given upon the suggestion of counsel, then the bail shall not be permitted afterwards to justify, unless at such given time, and unless such an affidavit is produced as before described. An affidavit for further time to justify on the ground that bail cannot attend, must state that the party had consented to become bail. *Trin.* T. 1813, *per Bayley*, J. MSS. And see next case.

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DIXON *against* CLARKE.

Saturday, Jan. 23d.

One bail after consenting to become such becoming insolvent, time given to add and justify another. (*a*)

AN affidavit was produced, which stated that bail in this case had been put in with their consent, but that afterwards one of them became insolvent; and now

E. Lawes moved for leave to justify one bail, and for time to add and justify another, giving the plaintiff's attorney two days notice of the added bail. Time was granted accordingly, and the other bail justified.

(*a*) Vide last case and note, and *Ayton's* bail, post 4.

RAWLINS'S *Bail.*

Saturday, Jan. 23d.

Bail admitting on examination that he was a certificated bankrupt, but had since been arrested and could not remember how often, but admitted that it was at least six times; the Court rejected both, and would not grant further time to add and justify other bail. (*b*)

ONE of the bail appearing to justify, admitted that two years since he had become bankrupt, and within two months afterwards had paid a dividend of eight shillings in the pound; that no further dividend had been paid; that he had obtained his certificate, but that since then, he did not remember how many times he had been arrested; he was sure of six times.

Comyn on these grounds submitted, that both bail ought to be rejected.

(*b*) Bail have been rejected who had become bail in other actions but said they had not kept an account, and did not know in how many actions or for what sums. *Lofft.* 72—194. *Tidd.* 6 ed. 268. Bankruptcy is not a ground of rejecting bail if the party has obtained his certificate, unless the bail has been twice bankrupt and has not paid fifteen shillings in the pound. *Smith* v. *Roberts*, post 9. and note. Persons discharged under the Insolvent Act may be rejected, because their future effects continue liable. *Id. ibid.* As to granting time to justify, see *Hunt* v. *Haynes*, post 7. and note to *Hayward's* bail, ante 1.

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Merewether, contrà, applied for time to add and justify other bail; but

BEST J. said, he saw no ground to grant the application, and thought that a person who was so unacquainted with the state of his affairs as one of the bail appeared to be, from his own statement, was very unfit to become security for the plaintiff's demand. No time, therefore, could be allowed, and the bail must be rejected.

Saturday, Jan. 23d.

AYTON'S *Bail.*

Bail after promise to justify, and notice of justification, having ascertained that he was not solvent, the Court allowed time to add and justify another bail, no opposition being urged on the part of the plaintiff. (*a*)

READER prayed time to add and justify a fresh bail in this case, in lieu of one mentioned in the notice, who, it appeared by affidavit, at the time he promised to become bail was not aware of the insolvent state of his circumstances, but which having now ascertained, he could not safely justify. The bail were unopposed.

The COURT granted two days to add and justify another bail, and allowed the other to be taken.

(*a*) Vide *Dixon* v. *Clarke*, ante 3, and *Anonymous*, post 11.

Saturday, Jan. 23d.

HONE *against* BARKER.

Where bail were excepted to in vacation, and defendant gave four days' notice of justification for the first day of *Hilary* term, but two days before that time gave notice of added bail; held that the latter bail were entitled to justify. (*b*)

H. I. STEPHEN opposed the justification of the bail in this case, on the ground of irregularity, under the following circumstances, viz.—Bail were put

(*b*) S. P. ruled by *Dampier*, J. after referring to the Master. *Mich.* T. 1813. MSS. By the rule, *East.* T. 5 *Geo.* 2. "If the exception be entered in vacation, and notice thereof given, the bail put in, *or other additional bail*, shall justify on the first day of the subsequent term."

1819.

HONE *against* BARKER.

in by the defendant in vacation time, and on the 8th of *December* the plaintiff entered an exception to them, and gave notice of the exception. Within four days after, the defendant gave notice of justification for the first day of the term, but on the 21st instant, he gave notice of added bail, who now attended to justify. This, he submitted, was irregular, and the added bail could not now be permitted to justify under such a notice, because the terms of the rule for better bail had not been complied with within four days after the service. The object of the rule was, that the party should declare, within a reasonable time, the bail upon which he intended to rely, which object would be defeated if this practice was allowed. By these means, the plaintiff would, during the whole vacation, be without real security, as merely nominal bail might be put in, whom both parties might know to be insolvent, and whom the defendant never intended to justify; and it would virtually amount to giving the defendant the whole vacation to find bail. He relied on *Lunn* v. *Leonard*, (a) in which this very point was decided. That was the case of bail *in error*.

BEST J. That is a material distinction; for such a rule might hold good in error, but not at all touch the present case. The case of bail in error is extremely different from this.

Stephen then referred to *Millson* v. *King* (b) as a decisive authority. There, bail above having been put in and exception entered in the vacation, it was held that notice of justification for the first day of the next term must be given within four days after such exception.

(a) 1 *M. & S.* 366. *Le Blanc*, J. however, in deciding that case, was careful in distinguishing it from the case of bail on mesne process.

(b) 9 *East*, 434.

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HONE against BARKER.

He admitted, however, that this case was distinguishable from the one before the Court, because in the former there was no notice of justification at all, except notice of justification of added bail.

BEST J. That makes all the difference. Here the rule for giving four days notice has been complied with, and there seems to me to be no objection to the justification of the added bail, after two days notice, the rule having been previously complied with of giving four days notice.

All the Bar present acquiesced, that such was the established practice of the Court, and that the notice given in this case was good.

Stephen then applied for further time to inquire into the sufficiency of the bail, who resided at *Wanstead* in *Essex*, urging, that the plaintiff had not had sufficient opportunity for that purpose; but

The COURT held him bound to inquire now into their sufficiency, and if they were ready to justify, there was no reason why they should not do so, and the bail accordingly justified.

Saturday, Jan. 23d.

ANONYMOUS.

Where a bail has ceased to be a housekeeper at the time he comes up to justify, the Court will grant time to add and justify another in his stead. (a)

ONE of the bail in this case stated that he was a housekeeper at the time he agreed to become bail for the defendant, but that since then he had ceased to be so.

BEST J. would not allow him to justify, but gave

(a) Vide *Dixon* v. *Clarke*, ante 3; and note to *Hayward's* Bail, ante 1.

the defendant leave and time to add and justify another bail, with the usual notice in term time.

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HUNT *against* HAYNES.

Saturday, Jan. 23d.

A defendant is bound to know the circumstances of the persons of whom he gives notice to justify as his bail. Therefore where notice had been given of bail, one of whom was notoriously not a housekeeper, and had refused to become bail on that ground after he had agreed to do so, the Court refused time to add and justify another.(a)

CAMPBELL applied for further time to add and justify fresh bail in this case in lieu of one, of whom the plaintiff had had notice, upon an affidavit stating that on Thursday last *John Moore*, the bail in question, had consented to become bail for the defendant, and justify himself with one *Joseph Stephen*, but that he had since refused so to do. Upon such an affidavit as this he trusted the Court would grant the indulgence for which he prayed.

Chitty resisted the application, and produced an affidavit, from which it appeared that the bail *John Moore*, of whom notice had been given, was not a housekeeper, and did not even reside in the house, of which he was described as the occupier in the notice of justification. Upon this affidavit he submitted that the defendant was not entitled to the indulgence prayed.

BEST J. I think this affidavit sufficiently accounts for the bail's change of mind. The defendant was bound to know the circumstances of the persons of whom he gave notice as his bail. He could not be ignorant of the situation of this man, and under such circumstances I do not think him entitled to any indulgence. Bail rejected, and time to add refused.

(a) See the note to *Hayward's* bail, ante 1; and see *Rawlins's* bail, ante 3.

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Saturday, Jan. 23d.

GEORGE *against* BARNSLEY.

Where one of the bail, of whom notice of justification was given, was an attorney, the Court refused time to add and justify another, holding that the defendant ought to have known that circumstance before notice was given.(a)

IN this case, bail by affidavit was put in, and opposed on the ground that one of the bail was an attorney of this Court, practising in the country. The affidavit in opposition stated only "that deponent *believed* the said *Lucas* to be one of the attornies of this honourable Court."

Walford in support of the bail said he would have applied for time to answer such an affidavit, but that he was now informed by his client that one of the bail of whom notice had been given was in fact an attorney of the Court, and therefore he should only apply for time to add and justify another bail.

BEST J. The affidavit of opposition is certainly sworn very loosely, and I should have granted time to answer it; but as the fact really is that one of the bail is an attorney, I think the defendant ought to have known that circumstance before he gave notice of justification, and therefore this is not a case for any indulgence.

Bail rejected.

(a) The rule *M.* 14 Geo. II. *K. B.* orders "that no attorney of this or any other Court shall be bail in any action or suit depending in this Court;" and "that no sheriff's-officer, bailiff, *or other person concerned in the execution of process*, be permitted to be bail in any action or suit depending in this Court." See the decisions, *Tidd*, 6th ed. 250, 1, 2.

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SMITH *against* ROBERTS.

Saturday, Jan. 23d.

Discharge under the Insolvent Debtor's Act, 53 *Geo.* 3. c. 102. disqualifies bail from justifying, as future effects are liable under that act. But bankruptcy is not of itself an objection when the party has obtained his certificate. (*a*)

MAULE opposed the justification of the country bail in this case on an affidavit which stated that *John Tricket*, one of the bail of whom notice had been given, had two years since taken the benefit of the Insolvent Debtor's Act, that all his effects had been assigned for the benefit of his creditors—that no dividend had since then been declared, and that the household goods in his possession were the separate property of his wife.

BEST J. Bankruptcy would not have been an objection to this bail, because, the certificate would have made him a new man; but the circumstance of his having taken the benefit of the Insolvent Act, is an insuperable bar to his justification, as under that act, his future effects are liable. (*b*) Bail rejected.

(*a*) Bankrupts who have not obtained their certificates may be objected to: or such as have been twice bankrupts and have not paid fifteen shillings in the pound. *Mountain* v. *Wilkins*, *M. T.* 21 *Geo.* 3. *K. B.* *Tidd*, 6 ed. 268. S. C. reported as of 24 *Geo.* 3. Imp. *K. B.* 180. 8th ed.; see *Rawlins's* bail, ante 3, and note *a*.

(*b*) See 53 *Geo.* 3. c. 102. sec. 10.

SIMMONS'S *Bail.*

Four days time given to correct a mistake in the bail-piece, which omitted to state that the bail

WALFORD applied for time to rectify a mistake in the jurat in this case, which was bail by affidavit, it not appearing in the bail-piece that the person before whom the bail was taken, was a commissioner.

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were taken before a commissioner. (a)

The COURT granted four days to obtain another bail-piece, serve fresh notice, &c. the proceedings having been at Brighthelmstone.

(a) Vide the two following cases; and *Hayward's* bail, ante 1. and form of bail-piece, *Tidd's* Forms, 4 ed. 114.

SIMMONS *against* MORGAN.

The jurat of the the bail-piece held defective because it stated "sworn at Market" instead of "*Market Harbour;*" but time given to amend the defect. (b)

IN this case the jurat of the bail-piece stated the oath to have been taken before the commissioner "at *Market*"—meaning *Market Harbour* in *Norfolk,* and *Merewether* applied for time to amend the proceedings.

BEST J. *Market Harbour* was evidently intended, from the previous recital of the bail-piece, but the mistake must be rectified. Take a week's time.

(b) See preceding case, and *Webster's* bail, infra.

Saturday, Jan. 23d.

WEBSTER'S *Bail.*

Jurat of bail-piece omitting to state place of swearing, time given to amend. (c)

THE jurat of the bail-piece in this case omitted to state that it was sworn "at *Southampton,*" from whence the proceedings came; and *Chitty* applied for time to re-swear and amend the proceedings. The COURT gave four days time for this purpose.

(c) Vide the last two cases, and *Hayward's* bail, ante 1.

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ANONYMOUS.

Saturday, Jan. 23d.

Where subsequently to taking bail in the country one of the parties became bankrupt, the Court gave time to add and justify another bail. (a)

ON the 13th of *November*, one of the country bail in this case was taken before a commissioner at *Bath*, when the party was in solvent circumstances; since then a docquet had been struck against him, and

Campbell now applied for time to add and justify another bail, and obtained four days.

(a) Vide *Dixon* v. *Clarke*, ante 3; *Ayton's* bail, ante 4; *Hayward's* bail, ante 1, and note to that case.

ELDON *against* HAIG.- -IN BANK.

Saturday, Jan. 23d.

Notice of executing a writ of inquiry on "Wednesday the 11th of *June* instant," when *Wednesday* fell on the 10th of *June*, on which day the writ of inquiry was executed, is sufficient, and the Court refused to set aside the execution of the writ of inquiry, the defendant not swearing that he was thereby misled. (b)

W. *E. TAUNTON* moved for a rule to shew cause why a writ of inquiry executed in this case should not be set aside for irregularity. The irregularity complained of was, that the notice of executing the writ of inquiry served upon the defendant was for "*Wednesday*, the 11th day of *June* inst.;" whereas the 11th of *June* fell on a *Thursday*. This, he contended, was clearly irregular. The defendant was entitled to his notice of executing the writ of inquiry for *Wednesday*. It was the plaintiff's business, therefore, to take care that his notice was conceived in correct

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(b) See also *Batten* v. *Harrison*, 3 Bos. & P 1. There are many cases in which a mistake in a notice, where the meaning is obvious, will not affect its validity, as if a declaration be delivered indorsed to plead in —, it will be understood to mean within the number of days allowed by the rules of the Court, and at the expiration of that time judgment may be signed for want of a plea. *Hifferman* v. *Langelle*, 2 Bos. & Pul. 363. In a notice to quit delivered at *Michaelmas* 1795, directing the tenant to quit at *Lady-day* 1795, the impossible year was rejected by the Court, and the notice held good, *Doe* v. *Kightley*, 7 *T. R.* 63. In like manner, an impossible year will be rejected in the English notice at the foot of common process, *Steel* v. *Campbell*, 1 *Taunt*. 4. 424.

terms; and if he worded his notice so ambiguously that there was no certainty as to the day mentioned, he must take the consequences. It was true, that the defendant's affidavit did not complain of having been deceived; but it stated, that the defendant had no reason to suppose that the writ of inquiry would have been executed under such a notice; and that he knew nothing of it until judgment was signed. Here the day of the week was the material thing to attend to; but in *Batten* v. *Harrison* (a), the day of the month was the most important feature of the notice, and there the Court rejected the day of the week as surplusage. The plaintiff, in that case, was right with respect to the day of the month, but wrong as to the day of the week; and it was held, that the mistake was not material; but here the material part of the notice being irregular, the defendant was entitled to the benefit of the objection.

ABBOTT C. J.—The mistake in this notice is apparent upon the face of it. The day of the week is rightly mentioned, but there is a mistake in the day of the month. It was the defendant's duty, under such circumstances, to have sent to the plaintiff to know whether he meant *Wednesday*, without reference to the day of the month, inasmuch as he was entitled to his notice for the *Wednesday*. Any reasonable man must have understood what was intended,—that it was intended to execute the writ of inquiry on that day in order that the plaintiff might have judgment within the time allowed him by the practice of the Court; and therefore considering the defendant to be a reasonable man, the notice was sufficiently understood. The defendant does not venture to say that he was misled, and I think we

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(a) 3 *Bos. & Pul.* 1.

cannot presume, what he will not venture himself to suggest.

BAYLEY J.—In the case of *Batten* v. *Harrison* (a), the Court supported the notice, and I think they did very right, because there the day of the month, and not the day of the week, was the material thing to attend to. Here the day of the week is the material point, and that day is expressed. If there was any mistake apparent upon the face of the notice, the defendant should have asked, "Do you mean one day, or the other?" It is not suggested in the affidavit that the defendant was deceived; and as we think he was not, there is no pretence for this motion.

HOLROYD J.—There is every reason to suppose that the defendant could not be misled by the notice, because the writ of inquiry was to be executed in Term time, and not in the long vacation. The defendant must have known that the object was to obtain judgment of the term, by the very notice which was given him. Wednesday being the 10th, and not the 11th day of the month, the defendant could not but have known the object of the plaintiff. It is suggested that the notice was served on the 2d, and therefore it would have been good for the 10th, but not for the 11th of *June*; but that will not help the defendant, for if there had been any mistake in the notice, it ought to have alarmed his suspicions, and induced him to ask of the plaintiff, which day was intended. He does not pretend that he was misled, and we cannot presume that he was.

BEST J. concurred with the rest of the Court.

Rule refused.

(a) 3 *Bos. & Pul.* 1.

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Saturday, Jan. 23.

Walton *against* Hutton.

TINDAL moved to change the venue in this case from *London* to *Cumberland*, upon an affidavit stating that the cause of action (rent of a house under 14*l.*) arose at Penrith in Cumberland—that the plaintiff had suffered one assizes for the county to pass without bringing his action, and that all the witnesses resided in Cumberland. The affidavit did not swear to merits, but the Court would infer merits, from the circumstances so stated.

The Court will not change venue from *London* into a northern county in *Hilary* Term on motion of defendant, without an affidavit of merits. (*a*)

Abbott C. J.—Unless you swear to merits, the Court cannot interfere. We ought not to be called upon to draw an inference, which the party himself will not venture to suggest. You must amend the affidavit by swearing to merits, if there are any.

Rule refused.

(*a*) See *Tidd*, 6 ed. 636, 7, 8.

Saturday, Jan. 23.

—— *against* Walters.

On the 19th *November* a motion was made to set aside the service of process for irregularity, but the Court refused the application, directing an amended affidavit to be produced, which was not done until the first day of the following term. *Held* that the application was too late, the party having suffered nine days of the previous term to clapse without renewing his application. (*b*) In order to set aside the service of a writ in a wrong county, there must be a positive affidavit, shewing that there could be no dispute as to the boundary. (*c*)

WALFORD, on the 19th of *November* in last Term moved to set aside the service of process in this case, on the ground of irregularity. The process

(*b*) In K. B. all motions to set aside proceedings for irregularity are rejected, unless made within a reasonable time, although no new step has been taken by either party. *Fletcher v. Wells*, 1 *Marsh* 551, per *Gibbs*, C. J. 1 *Marsh* 300. *Tidd*, 6 ed. 540.—In the Exchequer, they must be made in the term in which the irregularity is committed. 3 *Price Rep.* 37.—In C. P. the application must be made as soon as the irregular party takes one step more which shows that he does not mean to abandon the defective proceeding. *Fletcher* v. *Wells*, 6 *Taunt.* 191. 1 *Marsh* 550. *Dand* v. *Barnes*, 6 *Taunt.* 6.

was directed to the sheriff of the county of *Gloucester*, and had been served in an adjoining county. On that occasion the Court desired to have an affidavit, negativing that the service was within the confines of the county of *Gloucester*. (*d*) No such affidavit was produced during the remainder of the Term, and now *Walford* produced such an affidavit, and prayed the rule; stating, that the process was returnable on the last return day in Michaelmas Term, namely the 19th *November*.

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against WALTERS.

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1 *Marsh*, 403. 5 *Taunt*. 664. In *Ledwich* v. *Prangnell*, 1 *Moore* 299, the Court of C. P. held that the defendant might apply to set aside the proceedings for service of the writ in a wrong county, although the plaintiff had entered an appearance for him, and served him with a notice of declaration and given a rule to plead.

(c) The law is clear that the Courts will set aside the service of a writ in a different county from that to the sheriff of which it is directed, provided no doubt exists as to the boundaries of the two counties. *Chase* v. *Joyce*, 4 M. T. 412. *Williams* v. *Gregg*. 7 *Taunt*. 233. 2 *Marsh* 550 *S. C.* In the Common Pleas, the defendant may apply to set aside the proceedings, although the plaintiff may have entered an appearance for him, and served him with a notice of declaration, and given a rule to plead, *Ledwich* v. *Prangnell*, 1 *Moore* 299.

(*d*) Process served in a county adjoining that into which it is issued, will not be set aside if there be any dispute about the boundaries, *Chase* v. *Joyce*, 4 *M.* & *S.* 412. *Williams* v. *Grey*, 7 *Taunt*. 233. 2 *Marsh* 550 *S. C.* 1 *Moore* 299. And the affidavits in support of the application to set aside the process must negative any doubt. Thus in *Swiss* v. *Williams*, 13th *Nov.* 1818, E. WEST moved for a rule calling upon the defendant to show cause why the service of the latitat and the subsequent proceedings should not be set aside for irregularity, the latitat being directed to the sheriff of *Somersetshire*, and served in the parish of *St. Mary Ratcliffe*, in the county of the city of *Bristol*. The affidavits on which the rule was moved did not contain an allegation, that the place in which the writ was served was not on the confines of the county to the sheriff of which it was directed: nor did they state that the limits of the two jurisdictions were not disputed. But it was submitted, that if any doubt existed concerning the boundaries of the different counties, the fact should be stated in the affidavits in answer to the rule.

Sed per Curiam.—It is not sworn that there is no doubt as to the confines. Any doubt of that kind must be negatived in the affidavits in support of the application.——Rule refused.

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———

against WALTERS.

Per Curiam.—You are now too late in your application. You suffered the whole of the remaining part of the last term to go by without producing the affidavit required by the Court. There were nine days during which the amended affidavit might have been produced, and therefore you are now too late.

Rule refused.

Monday, Jan. 25th.

VANSANDON *against* CORSBIE.

A cognovit given in an action for debt, interest, and costs incurred after a secret act of bankruptcy, is discharged by bankruptcy and certificate. (*a*)

A MOTION was made last Term to stay proceedings in this case, upon a *cognovit* given by the defendant to the plaintiff, in an action upon a bill of exchange, as acceptor. On the 10th of *November* 1816, the defendant committed a secret act of bankruptcy; on the 15th he gave a *cognovit* in the action brought against him by the plaintiff; the cognovit was not delivered to the latter until the 21st, and on the 25th of *November* a commission issued against the defendant, and he subsequently obtained his certificate, the plaintiff neglecting to prove his debt under the commission. The plaintiff afterwards sued out execution upon the cognovit, and the ground of the application to stay the proceedings was, that the debt for which it was given being proveable under the commission, all further proceedings were barred by the defendant's certificate.

(*a*) The general rule is, that where the cause of action was for a debt existing before the bankruptcy, the interest and costs even of a writ of error accruing afterwards are likewise discharged in the same manner as the original debt, *Blandford* v. *Foote*, *Cowp.* 138. 2 *Stra.* 1196. 1 *Wils. Rep.* 41. *Scott* v. *Ambrose*, 3 *M.* & *S.* 326. *Cullen Bank. L.* 104 to 107. But if the original demand was for *damages*, and the judgment was not signed until after the act of bankruptcy, the certificate is no bar, though the verdict was obtained before, *Buss* v. *Gilbert*, 2 *M.* & *S.* 70.

F. Pollock now shewed cause, and he cited [illegible] v. *Ross* (a), where it was held that a *cognovit* [illegible] discharged by bankruptcy and certificate. It might be true that the original debt for which the *cognovit* was given, was proveable under the commission; but there was a part of the plaintiff's claim which would not have been allowed by the commissioners, viz. the interest on the bill of exchange and the costs of the proceedings, which formed a considerable part of the demand, and therefore quoad the interest and costs, judgment might be entered up on the *cognovit*, and execution issued, notwithstanding the defendant's certificate.

ABBOTT C. J.—The *cognovit* does not constitute a new demand, and consequently the debt for which it was given was proveable under the commission by 46 Geo. 3. c. 135. If it constitutes no new demand, then your old demand cannot now be sustained, for it is barred by the certificate. The interest in this case follows the nature of the original debt, and is not severable from it, and therefore if you cannot prosecute the defendant further for the principal, it seems to me that you ought not to prosecute him further for the interest. The case cited as an authority, does not appear to me to throw any light upon the subject; nor can I see the ground upon which that case was decided. The defendant there had given the plaintiff a *cognovit* for the amount of a banker's check, on which he was sued. About two years afterwards a second commission of bankrupt issued against the defendant, and he had since obtained his certificate. The plaintiff having entered up judgment, and taken out execution, a motion was made to set it aside, the defendant suggesting that the *cognovit* was discharged by bank-

(a) 2 *Taunt.* 68.

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ruptcy and certificate. The report says "But the Court observed, that a *cognovit* is a mere acknowledgment of the amount of the damages; and where a man acknowledges the cause of action, the plaintiff may sign judgment at any time. This was not like a warrant of attorney." Surely something more must have passed, than what is stated in the report. The case does not state whether there was a certificate under the first commission, nor that the defendant had paid fifteen shillings in the pound under the second. A case so stated we cannot consider as any authority on the present occasion. Suppose, in the present case, no *cognovit* had been given, and you had obtained judgment and sued out execution, could you have had any fruits of it? Surely not, for at the very time the defendant was a bankrupt. You would have been entitled to prove the debt under the commission, and you would have been allowed interest up to the date of it. The application, in this case, is to stay the proceedings, and I am clearly of opinion that they ought to be stayed.

BAYLEY J. It is quite clear that if you sue for a debt which carries interest, and obtain judgment, and the party afterwards becomes a bankrupt, (the original debt being proveable under the commission,) and he obtains his certificate, the interest and subsequent costs are not severable from the original debt, but the whole is barred by the certificate. You could have proved in this case principal and interest up to the date of the commission, and as the *cognovit* is given before the date of the commission, why then the whole is principal, and the one cannot be separated from the other. Suppose the *cognovit* to be in the nature of a new security, and that it ought to constitute a new debt, still as the commission did not issue till after it was given, you would be entitled to prove. All the late Acts of Par-

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liament allow you to prove principal and interest up to the date of the commission, without considering when the act of bankruptcy was committed. It seems not to be disputed that the principal debt is barred by the certificate, then if so, it appears to me that the interest and subsequent costs follow the nature of the original debt, and that the proceedings on the *cognovit* must be stayed.

HOLROYD J. and BEST J. both concurred.

Rule absolute.

JACKSON *against* HALLUM.

Monday, Jan. 25th.

Defendant having applied for, and obtained a rule for a new trial, after verdict against him, instead of going down again to trial, gave a cognovit, confessing the action:— *Held* that he was liable to pay the costs of the former trial.(*a*)

TRESPASS against a surveyor of highways, for removing an alleged nuisance to a public way. At the trial before the *Chief Baron* at the *Nottingham* Lent assizes, 1817, the plaintiff had a verdict, the defendant being prevented from going into evidence that the trespass was committed in removing a public nuisance, on an objection taken, that he had not, as surveyor, given the usual notice required by the 12th section of the general highway act, 13 *Geo.* 3. c. 78. to be given before a surveyor, in that character, removes a nuisance. In the following term, the defendant moved for and obtained a new trial, on the ground that any subject is at liberty to abate a public nuisance, and therefore the

(*a*) Where there was a verdict for the defendant, and a new trial awarded, upon a question of law, without any thing being said as to costs; and the parties, instead of proceeding to a second trial, agreed to state the facts specially, as if a case had been reserved at the first, on which the postea was afterwards delivered to the plaintiffs; they were held entitled to the costs of the first trial, *Robertson* v. *Liddell*, 10 *East.* 416. See the cases collected, *Tid.* 6th

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notice was immaterial, and the defendant ought to have been permitted to go into the merits of his case; but nothing was said about costs. Afterwards, the defendant declined going down to trial again, and gave the plaintiff a *cognovit*, thereby confessing the action. The Master, in his taxation of costs, not having allowed the plaintiff the costs of the former trial,

Hullock Serjt. obtained a rule in the last term, calling on the defendant to shew cause why the Master should not be directed to review his taxation, and to allow those costs.

Denman now opposed the rule, and cited the cases of *Mason* v. *Skurry*, (a) *Bird* v. *Appleton*, (b) and *Howarth* v. *Samuel*, (c) relying principally upon the general rule laid down in the first mentioned case, that, where nothing is said about the costs of the first trial, and they are not reserved to abide the event of the second verdict, the successful party on the second trial is not entitled to the costs of the first. This rule was strictly applicable to the present case, because it must be taken that the suit was determined by the *cognovit*, which in legal effect was the same as if it had been determined by a second trial; and there was no reason why the defendant should be placed in a worse situation than if he had gone into what might be more strictly called a second trial. The general rule being established by the cases referred to, there was no sound argument why it should be departed from, unless a case could be found precisely in point with the present. No such case could be found; for this was distinguishable from *Booth* v. *Atherton*, (d) where, after the argument of a special case, the Court directed a new trial, because the case

(a) *Dougl.* 437.
(b) 1 *East. R.* 111.
(c) 1 *B. & A.* 566.
(d) 6 *T. R.* 144.

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was insufficiently stated; the defendant, without going to trial again, gave the plaintiff a *cognovit*, and the Court held that the defendant was liable to pay the costs of the former trial. So severe a rule as this could not apply to the case of this defendant. There was nothing to compel him to go down to a second trial, and put himself to the enormous expense of such a proceeding. The only difference between terminating the suit by a *cognovit* and going down to a second trial, was that the plaintiff was put into a much better situation. Under such circumstances, the Court would hardly say that the defendant should suffer for not going down to a second trial.

Hullock Serjt. in support of the rule, said, that the only question was, whether the Court would in this instance conform to a rule of practice which had been established for more than thirty years in the case of *Booth* v. *Atherton*, (a) and which was precisely in point. The other cases cited were quite distinguishable from the present, in every respect. Relying, therefore, upon *Booth* v. *Atherton*, he submitted that the rule must be made absolute.

ABBOTT C. J. I think the plaintiff is entitled to the costs in this case. The plaintiff obtained a verdict at the first trial upon a point distinct from the merits of the case. On the application of the defendant for a new trial, the Court directed that there shall be a new trial, saying nothing as to costs; and if the case had gone on to another trial, the plaintiff would only have been entitled to the costs of that second trial, provided he had succeeded. But the defendant, finding that he has no ground of defence, and not chusing to run the risk

(a) 6 T. R. 144.

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of having damages found against him, thinks proper to give a *cognovit*, thereby acknowledging that he has no ground of defence. He confesses, by that proceeding, that the former verdict was substantially, though not formally, right. Something must have occurred, in the course of the first trial, to induce the Court to grant a new trial; but the defendant's subsequent conduct, in giving a *cognovit*, shews that he wanted no new trial, and, therefore, I see no reason why we should deprive the plaintiff of the costs of the first trial.

BAYLEY J. The case of *Booth* v. *Atherton* seems to me to be exactly in point, and every other case cited is distinguishable from the present. Where there is a rule for a new trial granted, and a second trial takes place, the cases in this Court say, that the costs of the first trial shall fall to the ground. The practice of this Court, in this respect, is different from that in the *Court of Common Pleas;* for there, if the two verdicts are the same, the party who succeeds in both is entitled to the costs in both. (*a*) But *Booth* v. *Atherton* establishes a distinction between the case where there is a second trial and that where there is not a second trial. Where a party has obtained a rule for a second trial, but afterwards says that he does not want a second trial, and does not chuse to stand the result of it, it shews that the application to the Court, to set aside the first verdict, was not founded on the merits and justice of the case. The case cited from 1 *Barnewell* v. *Alderson* is plainly distinguishable from this, because there the party, who was ultimately right at the end of the cause, was desirous of having allowed to him the costs of a trial upon which he was beaten. It seems to me that

(*a*) *Worcestershire* Canal Company *v. Trent* Navigation, 2 *Marsh*, 478. *Bird* v. *Appleton*, 1 *East*. 112. *Parker* v. *Wells*. 1 *Hen. Blu.* 639. note. *Trelawney* v. *Thomas*, 1 *H. Blu.* 641. *Tidd.* 6th ed. 937.

the Master, in this case, ought to have allowed the costs of the first trial. 1819.

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HOLROYD J. I am of the same opinion, that the costs of the first trial should not have been refused. The rule which has been laid down in the case referred to, of *Booth* v. *Atherton*, is applicable to the present case, and it appears to me, from the circumstances of this case, it is but justice that the plaintiff should have the costs he prays for. If I understand the case rightly, at the first trial the defendant defended himself upon the ground of being a surveyor, having special powers under the Highway Act. That ground of defence was met by shewing that he had not given the legal notice required by that act before he proceeded to pull down the alleged nuisance. He then said "notice is not necessary, because what I pulled down was a public nuisance, and all the king's subjects had a right to put it down;" and upon this ground he prayed that there may be a new trial granted, in order that the merits may be entered into. The new trial being granted, it was open to him to defend himself upon the ground that this was a public nuisance which all the king's subjects had a right to pull down. But he afterwards comes with a cognovit, and confesses, that "this was no public nuisance,—I had no right to pull it down, and I think it is unjust that it should have been pulled down." If then this was no public nuisance, and if he had no right to pull it down, there could be no pretence for a new trial, and therefore it is but just that he should pay the costs of the former trial.

BEST J. concurred with the other Judges.

Rule absolute.

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Monday, Jan. 25th.

WHITE *against* GEROCK.

Declaration that plaintiff was author of a *book*, being a musical composition called "*Captain Wyke*," is supported by shewing that the tune was only one of a collection of other tunes called "White's Collection of New and Favourite Tunes, as performed at all fashionable Assemblies, arranged for the Pianoforte." An author does not forfeit his copyright by having sold manuscript copies of the work before it is printed and published. (*b*)

ACTION upon the 54th *Geo.* 3. c. 156. s. 4. (*a*), for pirating a book. At the trial before *Bayley, J.* at the sittings at *Westminster* after last term, the plaintiff had a verdict with damages, the learned judge giving the defendant leave to move to enter a nonsuit, upon a question of variance. The declaration averred, "That the plaintiff was the author of a certain *book*, being a musical composition called "*Captain Wyke*." There were counts for pirating the whole book, and others for a part. To support the averment "that the plaintiff was author of a certain *book* called Captain Wyke," he gave in evidence a book entitled "White's Collection of New and Favourite Dances, as performed at all fashionable Assemblies, arranged for the Piano Forte." It appeared the composition in question was one of this collection, was sewed up along with others, and in fact occupied only part of a leaf, on the other side of which was some other tune. At the trial, it was objected that the allegation in the declaration was not supported by this evidence, it appearing that the publication in question was not a *book*, but only part of a book. The learned judge, however, overruled the objection, holding that as the tune pirated was a distinct part of the collection given in evidence, it satisfied the words of the declaration.

(*a*) By this statute it is enacted, that the author of any *book* composed, and not printed and published, or which shall thereafter be composed and printed and published, and his assignee, shall have the sole liberty of printing or reprinting such book for the full term of twenty-eight years, to commence from the day of first publishing the same; and also if the author shall be living at the end of that period, for the residue of his natural life.

(*b*) But in the case of patents, it seems that if, previously to the patent being granted, the article has been publicly vended, though for only four months, and by the patentee himself, the patent is void, *Wood* v. *Zimmu*, 1 *Holt*, *C. N. P.* 58.

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Campbell now moved for a rule to shew cause why the verdict should not be set aside and a non-suit entered, upon two grounds: 1. That the averment in the declaration was not made out by the evidence; and 2. That the plaintiff had forfeited the protection of the copyright act by having published in manuscript many thousand separate copies of the tune, before it was printed in the form it now assumed. As to the first, he was not prepared to contend that a single sheet might not be a book, but his argument was, that the tune pirated was not one entire composition, and that there was a difference between a part and the whole. There was no evidence before the Court that the tune called *Captain Wyke* had ever been printed and published on a separate sheet; for the only shape in which it had been printed and published, was as part of a collection called "White's Collection of New and Favourite Dances, as performed at all fashionable Assemblies, arranged for the Piano-Forte." It was impossible therefore to say that the part was likewise a book, as well as the whole collection;—it could not be both part and whole at the same time. This was not like the case of a volume divided into several parts or books, such as the Iliad of Homer. To apply the term book to this publication, would be a total misapplication of the sense and meaning of the legislature in framing the 54th *Geo.* III. c. 156. It was no answer to the objection to say, that the tune in question was separate in itself, and therefore might be called a book. With equal propriety might a person say, who had published a tale called *Alladin, or the Wonderful Lamp,* that he was author of *the Arabian Nights Entertainments*; because the former would only be a part, and the latter the whole. The statute itself made a distinction, in the very section on which this action was founded, between a book and a sheet. If it could be said that this tune was a book, every bar of it,

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nay, every note of it, might with equal propriety be called a book, for to such extent must the argument go if it could be sustained. Now, as to the second point; it was proved that the plaintiff had, a year or two before, published several thousand separate copies of this tune in manuscript at one shilling each. By having so done, he had forfeited the protection given by the statute of *Anne*, c. 19. s. 5.; for by that statute the *printing* and *publishing* was a condition precedent, before the party could entitle himself to the copyright.—Upon these grounds he submitted that the defendant was entitled to enter a nonsuit.

ABBOTT C. J.—I am of opinion that the words of this act of parliament (*a*) mean all original compositions, whether they are large or small, and are consequently entitled to the protection intended by the legislature. It has been held that a musical composition is a book, and that an action is maintainable for pirating a single sheet of music.(*b*) The only distinction here is, that this piece of music is found in company with others instead of being printed by itself; and it seems to me, that that does not make any difference in the principle of the question. Many different books or subjects may be found in one, but that is no reason why each should not have the protection of the statute. As to the *second* objection, it appears to me that the legislature never intended to deprive an author of the benefit of copyright, by having sold copies of his work in manuscript before he printed it. The statutes of 8 *Anne* and 54 *Geo.* III. are *in pari materiam*, and are only intended to enlarge the duration of the copyright. The words "printed and published" in the former act, have refer-

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(*a*) 54 G. 3. c. 156.

(*b*) *Clementi* v. *Goulding*, 11 *East* 244. 2 *Campb.* 25. and vide *Hiric* v. *Dale*, ibid. 2 *Campb.* 29 n. S. C. *Storace* v. *Longman*, 2 *Campb.* 27 n.

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ence only to the time at which the author's exercise of right is to be dated, and therefore the circumstance of the plaintiff having previously published this piece in manuscript, would only vary the period of time at which the twenty-eight years would be calculated. On neither of the grounds suggested does it appear to me that this verdict ought to be disturbed.

The rest of the Judges concurred.

Per Curiam. Rule refused.

HOAR *against* HILL.

Monday, Jan. 25th.

Affidavits which ought to have been filed a week before Term, may be read with leave of the Court in shewing cause on the second day of the Term, though filed only on the 22d instant. (*a*)

THIS was a rule for staying proceedings on mesne process enlarged from last Term, and stood in the peremptory paper for this day.

E. Lawes now wished to shew cause upon affidavits, which according to the terms of the rule ought to have been filed a week before Term, but which in fact had only been filed on the 22d instant.

Bowen objected that these affidavits could not now be read.

ABBOTT C. J.—We will consider Mr. *Lawes* as moving that the affidavits may be filed *nunc pro tunc*,

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(*a*) In the King's Bench, where a specific time is limited in any rule, before which any affidavit is required to be filed, no affidavit filed after that time can be made use of in Court or before the Master, unless it appear to the satisfaction of the Court that the filing of such affidavit within the time limited was prevented by inevitable accident, *R. M* 36 *Geo.* 3. K. B. *Tidd*, 6 ed. 526. In other cases, where no particular time is prescribed for filing the affidavits on which a party shews cause, they may be sworn and filed at any time before shewing cause, though after the day appointed by the rule.

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HOAR against HILL.

though that motion ought to have been made on the first day of Term. We will, however, hear you in shewing cause against the reading of these affidavits. No sufficient cause to the contrary being shewn,

The affidavits were read.

Tuesday, Jan. 26th.

KEARNEY *against* KING.

If a declaration upon a bill of exchange state that the bill was drawn at *Dublin* for a certain sum of money, without averring that *Dublin* is in *Ireland*, or that the bill was given for Irish currency, it must be taken to mean that the bill was drawn for English money; and if it appear in evidence that the bill was drawn for Irish currency, the variance is fatal. (*a*) Written securities must be stated in pleading according to their legal effect; and it is not always sufficient to describe them in the words in which they are expressed.

DECLARATION in assumpsit on a bill of exchange, by the indorsee against the acceptor. The declaration stated—" That certain persons using the style of *Eggleso* and *Power*, on the 1st *May*, 1816, at *Dublin*, to wit, at *Westminster*, &c. drew a certain bill of exchange bearing date the day and year aforesaid, directed to the defendant, and thereby required him, eight months after the date thereof, to pay to the order of them (the said *Eggleso* and *Power*) the sum of 542*l*. 1*s*. 8*d*. for value received by defendant, which bill he the said defendant afterwards, to wit, on the day and year aforesaid, at *Dublin* aforesaid, to wit, at *Westminster* aforesaid, upon sight thereof accepted, and that the said persons to whose order the said sum of money was to be paid afterwards at *Dublin* aforesaid, to wit, at *Westminster* aforesaid, indorsed and delivered the said bill to the plaintiff." At the trial before *Abbott* J.

(*a*) In like manner, if a declaration allege generally that the defendant agreed to sell a certain number of bushels of corn, and the contract appears to have been to sell the same number of bushels, but of a peculiar description, the variance will be fatal; for the general term bushels must be taken to mean the statute bushels. *Hockin* v. *Cooke*, 4 T. R. 314. There was a case before the Judges on a criminal prosecution where a question arose upon a note for 20 pound, which it was said might mean pound weight, and the Judges were of opinion that it ought to have been described as meaning 20*l*. in money. Per *Chambre* J. 1 *Marsh*. Rep. 215.

and a special jury at the *Middlesex* sittings after last *Trinity* Term, the bill of exchange was given in evidence to support the declaration, and was as follows: 1819.

KEARNEY *against* KING.

Ex. £542. 1. 8. *Dublin, May* 1st, 1816.

Eight months after date please to pay to our order the sum of five humdred and forty-two pounds one shilling and eight-pence *sterling*, for value received by furniture delivered at *Belvidere* by

Eggleso & *Power*.

To *John King*, Esq.

Accepted " *J. King*;" payable when due at Messrs. *Ball* & Co. bankers, *Dublin*.

(Indorsed) *Eggleso* & *Power*.

It appeared in evidence that the bill was drawn in *Dublin* for Irish money, and it being proved that Irish money was one-thirteenth less than British money, *Topping*, for the defendant, objected that there was a variance between the bill and the statement of it in the declaration, submitting that according to the latter the bill was for 542*l.* 1. 8. *British money*, whereas the bill was in fact for *Irish money*, having been drawn in and dated *Dublin*. The learned Judge reserved the point, and the plaintiff had a verdict for 542*l.* 1. 8. with liberty to the defendant to move to enter a nonsuit. Last Term a rule *nisi* was accordingly granted for that purpose; and now

Marryatt and *Littledale* shewed cause. The only question in this case is, whether the declaration is objectionable by having omitted to aver that the bill was drawn for *sterling* money. It is agreed on all hands that Irish currency was intended, that the instrument purports to be drawn in *Ireland*, and that it was made payable in that country. The bill purports to be drawn for so much money *sterling*; but that word is omitted

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KEARNEY against KING.

in the declaration. The whole objection, therefore, is reduceable to that single point. But the omission of the word *sterling* does not constitute a variance, as has been expressly held in *Glossop* v. *Jacob*. (*a*) That was the case of a foreign bill accepted for the payment of 100*l*. *sterling*, and it was held that the omission of the word sterling in the declaration was not a material variance. It does not appear by the report from whence the bill was drawn, but in fact it was drawn at *Copenhagen*, as many other bills from the same quarter were afterwards litigated. Then, if the omission of the word *sterling* is not material, it is clear that the declaration is otherwise free from objection, because it has set out the very terms of the bill, which is all that the plaintiff need do. If the declaration shows the real date of the bill, where it is drawn, and the amount, the Court will assume that it is drawn according to the course of the country where it bears date. This has been done literally, and therefore that consequence must follow. It is true that the instrument must be set out according to its legal operation, but the legal operation must be described by such words as the pleader conceives will express that operation. The legal operation, however, is sufficiently shewn, by setting out the instrument itself, which has been done in this case, and the Court will say what is the legal operation. If the instrument is literally set out, the Court and jury will decide what damage the plaintiff has sustained. The legal operation does not come before the Court sitting in Banc, if the instrument is rightly set out. If this was a demurrer to the declaration, and the Court saw that the bill was properly set out upon the record, then they would direct the case to go to the jury, to see what damage the plaintiff had sustained by

(*a*) 1 *Starkie*, 69.

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reason of what was stated in the declaration. It was not necessary to state that this was Irish money, nor that the bill was drawn in Ireland, for since the Union the Court will take judicial notice of that country, as part of the United Kingdom. (*a*) The instrument being set out according to its words, that is all that is necessary, as it is entirely matter of evidence to show that *Dublin* is in *Ireland*, and that the money for which the bill was drawn was Irish currency.

ABBOTT C. J. The strong objection to this declaration is, that every body looking at it will assume that the plaintiff is proceeding upon a bill for 542*l.* 1. 8. *English money*. Any person who reads this declaration must assume that; whereas the bill is drawn for 542*l.* 1. 8. *Irish money*. I think that the addition of the word *sterling* would not at all cure the objections to this declaration. The difficulty which the plaintiff has to encounter, is to satisfy the Court that this declaration is properly adapted to a bill drawn for 542*l.* 1. 8. *Irish currency*. It seems to me, therefore, that the single question is, whether an English Judge sitting in an English Court of Justice, and reading the declaration according to the words "the sum of 542*l.* 1. 8. for value received," and without any thing to shew that the parties did not mean English money, can understand it as being of any other value? I am of opinion that he cannot. Is there any thing in this declaration from which the Judge would be informed that the parties did not mean money of *England*, but the money of some other part of the United Kingdom? No such information is any where to be found upon

(*a*) The Courts, it is said, will take judicial notice of the extent of ports, and of the river *Thames*, but not of the local situation of parishes, vills, or particular liberties. 2 *Inst.* 557. *Comb.* 460. 1 *Stra.* 469. 1 *Hen. Bla.* 356, 7. Lord *Raym.* 1379.

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this record. All that the declaration says is, "that certain persons on the 1st of *May*, 1816, at *Dublin*, to wit, at *Westminster*, drew a certain bill of exchange," without mentioning in what part of the world *Dublin* is. The framer of the declaration has not said that *Dublin* is in *Ireland*, and we cannot assume it, whatever may be our belief upon the subject. Neither has he averred that the sum of 542*l*. 1. 8. was Irish currency; and there being nothing to show but that English money was meant, I think this declaration clearly bad, and consequently that the rule must be made absolute for a nonsuit.

Bayley J. I am of the same opinion. The true objection here is, that the declaration imports a bill for money generally, without stating where the bill is to be paid; whereas the bill in reality is for Irish, and not for sterling money. It may be true, that it is stated that the bill is drawn at *Dublin*, but it does not follow from thence that *Dublin* is in *Ireland*. It does not state "in parts beyond the seas," but "at *Dublin*;" and it does not say where the bill is payable. In the case cited from *Starkie's* Reports, the declaration was framed as if it was for English money; and if it had not been so framed, it would have been a variance. There is no averment that *Dublin* is in the Kingdom of *Ireland*, and we cannot look to the evidence to satisfy us on that point. The money stated in the declaration is *primâ facie* 542*l*. 1. 8. *English money*. In pleading, the established rule is to set out the instrument according to its legal operation, and not leave it to be explained by evidence. The materiality of the averment, that this was Irish currency, is quite obvious, considering the difference between the currency of the two countries. Unless we are informed that *Dublin* is in *Ireland*, we cannot give the legal operation to the declaration, which is contended

for; because there may be a *Dublin* in *America* or *Scotland*. It is true, that the bill may be set out in its very words, but still the legal operation is different from the words; and it is an invariable rule, that in framing the declaration, the substantive and legal operation must be stated, and not the words. It is nothing to say that the plaintiff has taken damages after the rate of Irish currency, because he has not set out in his declaration what sort of money he is entitled to demand. I am therefore of opinion that the variance in this case is fatal, and that this rule must be made absolute.

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HOLROYD J. It appears to me, that in order to set out the bill truly and according to its effect, it should have been stated, that it was for Irish money, because it is distinctly admitted that Irish money was meant. But there are other objections to the declaration. It is not alleged that the bill was drawn in *Ireland*; it is not alleged where the acceptor lives; nor does the declaration describe upon whom it was drawn, or where it was payable. It is not stated, that the bill was accepted (according to the fact) and made payable at such a place; nor does it at all state that the bill was to be paid in *Ireland*: there is nothing to shew in the declaration, that *Ireland* was the place where it was to be paid, and *non constat*, but it was to be paid in English pounds shillings and pence. As the bill was in fact drawn in *Ireland*, and was in fact to be paid in Irish pounds shillings and pence, that is a variance from the statement in the declaration, because the import of the bill under these circumstances is not truly stated therein. The plaintiff has not proved his case upon the record.

BEST J. The finding of the Jury in this case, instead of assisting the plaintiff, makes the objection still

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stronger against him; for if the bill had been truly described in the declaration, he would have been entitled to take 542*l.* 1. 8. English currency. The bill is, in fact, not of that value; and therefore he could not take a verdict for that amount. It is not the bill described in the declaration; for the bill, as set out, is for 542*l.* 1. 8. *in money*. What is meant by *money?* When you speak simply of *money*, you mean *English* money. This bill, it appears, was not intended to be given for English money, but Irish; and therefore that was not the bill given, which is stated in the declaration. The defendant, under such circumstances, would be well warranted in saying to the plaintiff, " I never promised to pay you a bill for 542*l.* 1. 8. I promised to pay you one-thirteenth less than that sum, and therefore you cannot support the issue in this case." For these reasons, I am of opinion that a nonsuit must be entered.

Rule absolute.

Marryatt, Littledale, and *Taunton,* for the plaintiff.
Topping, E. Lawes, and *Platt,* for the defendant.

Tuesday, Jan. 26th.

THE KING *against* THE JUSTICES OF DEVON.

This Court has no authority to compel the Quarter Sessions by mandamus to give their reasons for their judgments, or make any special entries upon their records; and the rule for a mandamus was discharged with costs.

TANCRED last Term obtained a rule for a mandamus directed to the defendants, commanding them to enter continuances on an appeal between the parishes of *St. Mary* and *Buckland Monochorum*, in the county of *Devon*, and also to alter the judgment of the Quarter Sessions as recorded, by making a special entry upon the record, of the reasons of their judgment.

Casberd and *Peters* now shewed cause against the rule. This application is quite out of the common

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course, and the Court has no authority to grant it. There are only two modes of proceeding with reference to the practice of the Quarter Sessions; first by certiorari to bring the proceedings into this Court for its consideration; and, secondly, where the Court below have given a conditional judgment, subject to a case for the opinion of this Court. Under such circumstances the proceedings are removed into this Court, and all matters of law are submitted to it for its determination. The ground upon which this application is made, is, in order that the appellant parish may not be concluded by the judgment as recorded in the Court below; and for this purpose it is required that the clerk of the peace may make a special entry upon the record, reciting the reasons of the Court for the judgment it has given. This Court has no authority to interfere with the Court below, and compel it to give the reasons for its determination. It is not necessary in the judgments even of the Court of King's Bench, that the reasons should appear upon the face of its judgments. The same principle equally applies to Courts of Quarter Sessions. In the case of *South Cadbury* v. *Braddon*(a) it was held that the justices are not bound to express the reason of their judgment in the judgment, any more than other Courts; and if it was otherwise held, it passed without due consideration. The reason of their judgment must be collected from the record, as where judgment is arrested upon an insufficient indictment. If the judgment of the Court below is general, there is no mode of correcting that judgment. It is quite clear that a subsequent Session has no control over the judgment of the preceding Session. What the parties should have done if they were dissatisfied with the judgment in the terms in which it was given, was to make a special application in the

(a) 2 *Salk.* 607.

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Court below to make a particular entry on the record. But the parties acquiesced in the judgment then given, and nothing was said about a special entry. They suffered the Sessions to elapse, and then they come, not at the beginning of the Term, but on the very last day, to make this application. So that two Sessions have elapsed, and this is nothing more than an oblique mode of getting at this question in the shape of a new trial. Such a proceeding was never heard of before. It was competent for the first Session to review their own judgment, but as the parties acquiesced in that judgment, it is now too late to disturb the proceedings. It is therefore not open to them to come with this application; but even if it were, this Court has no jurisdiction over such matters.

Tancred in support of the rule for a mandamus. It is the duty of every Court to enter correctly its judgments, so that the decision shall be conclusive between the litigating parties.* If this rule was applicable to superior Courts, it was more peculiarly applicable to the judgments of Courts of Quarter Sessions, because those judgments cannot be corrected by writ of error, or any other mode of review. In this case the difficulty is, that the judgment of the Court below is not applicable to the case then before the justices, because the Sessions have proceeded upon a collateral point, and their order is conclusive as between the two parishes then nominally before the Court; but the fact is that a third parish is interested in the decision, but has not been heard. It is the duty of the Court below to enter its orders in such a manner as that they shall speak what the decision of the Court really was, but here the decision is general without explaining upon what ground it proceeded. It is suggested now that the decision of the Sessions was acquiesced in at the time. That is not quite so, because it did not occur

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to the counsel at the moment that a special entry was necessary. Certainly there is no direct authority to be found in the books holding that this Court will by mandamus order an inferior Court to give the particular grounds of its judgment. But where justice has not been done to the parties below, there is no other mode of redress than by mandamus to compel the inferior jurisdiction to do its duty. In this case the justices had no jurisdiction to make the order in the terms in which it is expressed, and therefore this Court has power to direct them to express their order in such terms as are applicable to the case.

ABBOTT C. J. The difficulty in the way of this application is to shew that we have any authority to grant it. No instance has been cited in which this Court by mandamus ever ordered a Court of inferior jurisdiction to give their reasons for their particular judgment. Although our powers are great, they are not unlimited —they are bounded by some lines of demarcation. I am not aware that we have any power to interfere with the jurisdiction of the Court below, in the way suggested; and as the Counsel has not been able to cite y instance of the kind, it appears to me that this ap- cation cannot be sustained.

The rest of the Court concurred.

Campbell amicus Curiæ said that five years since he made a motion exactly similar to the one now before the Court, but it was refused, expressly on the ground that the Court had no jurisdiction to grant a mandamus to the Quarter Sessions to compel them to make a special entry.

ABBOTT C. J. All that we have been in the habit of doing is to order them to hear and decide cases which they have refused to hear. I disclaim any power

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to compel the Sessions to give the reasons for their judgments.

Casberd then applied for costs, suggesting that the justices had been brought here unnecessarily to answer this application.

The Court said, that if the justices had been put to any expense, the rule must be discharged with costs.

Rule discharged with costs.

Tuesday, Jan. 26th.

Anonymous.

Where an arbitrator authorized to tax costs in a cause, has allowed an item which it is insisted ought not to have been charged, the Court will not refer the matter to the Master.

GASELEE moved for a rule to shew cause why it should not be referred to the Master to review the taxation of costs in this case, the subject of costs having been referred by mutual consent to an arbitrator. The affidavit upon which the motion was made, complained that the arbitrator had allowed the sum of 25*l.* for the expense of a solicitor, who was brought from the country as a witness on the part of the plaintiff, but whose evidence was wholly unnecessary, and migh have been supplied by other evidence. The defenda had paid money into Court pursuant to a rule for th purpose, and therefore this was a fit subject to go befo the Master..

Abbott C. J.. The person who has taxed the costs is an arbitrator of your own choice. He seems to have been of opinion that the charge made ought to be allowed. Under such circumstances, it is too much to call upon us to interfere with the decision of an arbitrator whom the parties have themselves chosen.

Rule refused.

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SILVER *against* HESELTINE.

Tuesday, Jan. 26th.

Declaration upon a contract for not delivering a quantity of gum senegal, may be supported by evidence of a contract for *rough* gum senegal, it appearing in evidence, that all gum senegal, on its arrival in this country, is called *rough*.

DECLARATION upon a contract for not delivering a quantity of gum senegal bought by the plaintiff of the defendant. The contract set out in the declaration was, that the plaintiff had bought of the defendant 50 tons of sound merchantable gum senegal, similar in quality to a hogshead set aside as a sample; the plaintiff to have 14 days grace in case it did not arrive within three months, and liberty to contract for one month longer; to be taken from the king's beam. At the trial before *Best J.* at the sittings at Guildhall after last Term, the contract was given in evidence, from which it appeared that it was for *rough* gum senegal, which had not been garbled. It was objected that this was a fatal variance between the contract set out in the declaration and that given in evidence; but the learned Judge overruled the objection, and the plaintiff had a verdict, but with liberty to the defendant to move to enter a nonsuit.

Marryatt now moved accordingly. The objection to this declaration is, that it varies from the contract, which is for *rough* gum senegal. As the parties agreed to insert that word in the contract after it was made, it ought to have been set out in the declaration. The declaration is quite conformable to the contract with the exception of the word *rough*, which is certainly very material, because if the plaintiff is allowed to go upon the contract set out, he would have a right to *any* gum senegal which was sound and merchantable. It appeared in evidence at the trial, that gum senegal is sometimes imported rough, and sometimes garbled; and therefore as there is a distinction in the state of the ar-

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ticle itself, the plaintiff ought to have set out the contract in the very terms in which it is expressed. The contract in fact does not sustain the allegation in the declaration as to the description of article contracted to be delivered. If the gum which the plaintiff claimed was garbled, he was not entitled to receive it under this contract. The plaintiff having thought it material to insert the word *rough* in the contract, he was bound to declare upon the contract so framed. He is not entitled to any gum but rough; whereas he claims by his declaration damages for not delivering 50 tons of garbled gum. The gum was in fact rough when it arrived, but the real objection is that the plaintiff has made a claim for a much larger quantity than that set out in the declaration. As the plaintiff has not thought proper, however, to set out the contract in the terms agreed upon, it is a variance, and the defendant is entitled to enter a nonsuit.

ABBOTT C. J. I am of opinion that the contract proved in this case sustains the declaration. The declaration is, that the plaintiff bought of the defendant a quantity of sound merchantable gum senegal, similar in quantity to a hogshead which the plaintiff had selected as a sample, and if the vessel did not arrive within three months, the buyer was to have 14 days grace, with liberty to contract for one month more, to be taken from the king's beam. The contract produced contains all that is set forth in the declaration, except that there is in it the additional word *rough* as applied to this commodity. If the insertion of that word rough imported a commodity of a different description, then the contract as alleged in the declaration varies from the contract given in evidence. But from the evidence given (as I collect it from my brother *Best*) I think the insertion of that word does not import a commodity of a different description; for the evidence

is, that all *Senegal* gum upon its arrival in this country from Africa, falls under the appellation of rough. Now if this is a contract for gum senegal, to arrive from a foreign country by a certain vessel, and to be taken at the King's beam, it must be taken before it can become rough. The introduction therefore of the word rough, in my opinion, does not vary the contract as set forth.

BAYLEY J. I think that the evidence given in this case negatives the idea of a variance. You are not bound to insert in the declaration all that may be tacitly implied. If the word *rough* is virtually included in this declaration, it is not necessary to introduce it in letters. According to the testimony of the witnesses, all gum senegal that arrives, is either entirely rough, or French garbled. Now if it arrives in that state, it is in the language of the merchants here—*rough*; and therefore, whether entirely rough or French garbled, when it arrives here it would answer the description conveyed by the word rough in this country; and these are the ordinary states in which gum senegal does arrive. If it had arrived as English garbled (in the way in which the defendant's Counsel assumes) and not as French garbled, why then it might be said that this is a different description of commodity from that which is ordinarily imported, and it would be open to the plaintiff to say that he was not bound by the contract, on the ground of its difference of importation, and in that respect he would be entitled to repudiate it. The defendant in that case would also be entitled to repudiate it, because the plaintiff had not set out his contract accurately. But it seems to me, upon the evidence in the cause, that whether the word rough was in terms introduced or not, into the contract, it signifies nothing, because the contract would inform us that the gum senegal has not arrived, importing that it is either to arrive entirely

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rough, or to arrive French garbled only. If it arrives English garbled, that is a different commodity, which you cannot have without the introduction of the word rough, unless you are entitled to have either French or English garbled, if there be any gum senegal of the latter description. It seems to me in this case, that the contract laid in the declaration as connected with the evidence, imports that the gum senegal was to be rough; and therefore I think the omission of the word rough is immaterial.

HOLROYD J. I am of the same opinion, for the reasons given by my Lord, and my brother Bayley. It was unnecessary to introduce the word *rough* into the declaration.

BEST J. I am of the same opinion. The evidence was, that all gum senegal, whether French garbled or not, is understood to be rough when it comes here.

Rule refused.

Wednesday, Jan. 27th.

IN BAIL COURT.—CARTER'S BAIL.

Where the Court granted indulgence for a particular day to add and justify bail, and the party did not attend on that day, he cannot justify on a subsequent day without a fresh rule for that purpose. (*a*)

IN this case notice of justification had been given for the first day of Term, when one of the bail justified, and the Court gave time to add and justify another, and a rule was drawn up accordingly, but the added bail did not attend; and upon coming up now to justify,

V. Lawes objected to his being taken, contending that the rule being drawn up for *Tuesday* the 26th in-

(*a*) If bail do not justify at the time appointed, and no further time be given, they are said to be out of Court, 1 *Crompton*, 3d edit. 64. *Tidd Pr.* 6th edit. 270. See rule, ante 2, n. *b*.

stant, it was peremptory, and the bail not chusing to come to the Court on that day, the defendant was precluded from all further indulgence.

Reader contended that the rule was not peremptory, and that it was in the discretion of the Court either to take the added bail now, or to direct a fresh rule to be drawn up for this day.

HOLROYD J. It certainly is a matter of discretion with the Court. As the rule was drawn up for *Tuesday*, and the bail did not attend, I think he cannot now justify. But a fresh rule may be drawn up.

YATES'S BAIL.

Wednesday, Jan. 27th.

Two notices of justification, one being of added bail, the affidavit of service did not designate which of the notices had been served upon plaintiff's attorney: *Held* that the affidavit was defective and must be amended and resworn, before the bail could justify.

IN this case, two notices of justification had been given to the plaintiff's attorney, one of which was of added bail; and in the affidavit of service to which the two notices were annexed, the deponent stated "that he had served another notice by delivering it to a female servant at the house of the plaintiff's attorney," without designating which of the notices it was he had so served.

HOLROYD J. said, that the bail could not justify under such an affidavit of service, for *non constat*, which of the notices was so served, under which the bail came up to justify. The deponent in his affidavit should have designated by the letters A. and B. the notices sworn to have been served. The affidavit must therefore be resworn.

The affidavit being accordingly amended and resworn, the bail were permitted to justify.

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STEER v. SMITH.

The statute 43 Geo. 3. c. 46. § 6. authorizing the justifying bail in vacation on an arrest on mesne process, does not extend to a person in custody upon a habeas corpus removing the cause from the Mayor's Court into K. B. But although three notices were given of the same bail to justify in vacation time before different Judges, and the plaintiff had incurred the expense of three oppositions, yet upon their now appearing to justify upon a fourth notice, the Court held that they had no authority to compel the payment of the costs of opposition as the bail justified; though it might be the subject of an application to the Court against the attorney for vexatious proceedings. (a)

ANDREWS applied for the costs of former oppositions before the bail in this case should be permitted to justify, under the following circumstances;—this case was removed by habeas corpus out of the Lord Mayor's Court of *London* in vacation time into this Court. The bail which were now brought up to justify had been offered at chambers before Mr. Justice *Best*, who thereupon decided that the statute 43 *Geo.* 3. c. 46, authorizing the justification of bail in vacation time only applied to arrests on *mesne process* out of the courts at *Westminster*, and not to a person in custody upon such *habeas corpus*, and therefore would not then permit them to justify. Notwithstanding this rejection in vacation time, the defendant had given two other notices of justification for the same bail before the other Judges, but had not tendered the bail; and now another notice for this morning, when they made their first appearance. The plaintiff had been put to the expense of appearing to these several notices. Under these cir-

(a) See same case in Bank, post 80. Before the passing of the 43d *Geo.* 3. c. 46. s. 6. it was doubtful whether a prisoner could in any case be bailed in vacation; and that statute enacted, that after the first day of *June* 1803, if any defendant should be taken, detained, or charged in custody at the suit of any person or persons upon *mesne process issuing out of any of his Majesty's Courts of record* at *Westminster* or *Dublin*, and should be imprisoned or detained thereon after the return of such process, it should and might be lawful for such defendant in vacation time only, and upon due notice thereof given to the attorney for the plaintiff or plaintiffs in such process, to put in and justify bail before any one of the justices or barons of the Court out of which such process shall have issued, who may, if he shall think fit, thereupon order a rule to issue for the allowance of such bail, and may further order such defendant to be discharged out of custody by writ of supersedeas or otherwise, according to the practice of such Court, in like manner as the same is and may be done by an order of Court in Term time. *Tidd*, 6th ed. 272, 3.

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cumstances the Court, he trusted, would allow the costs which the plaintiff had incurred in consequence of the former notices, before the bail were now permitted to justify. These would not be costs in the cause, and would not be allowed by the Master, and therefore the application must be made specially to the Court. He certainly had no express authority for such an application, but it was a subject for the discretion of the Court.

HOLROYD J. Unless you can find some authority for such an application, it seems to me that I have no power to direct the payment of the costs under the circumstances stated. It is not like the case where there are several notices of different bail, and does not fall within the rule applicable to that case. Undoubtedly what has been stated may be the subject of an application to the Court against the attorney for vexatious proceedings. I do not see any other mode by which relief can be granted. Vexatious proceedings may be checked in that manner. You will exercise your discretion whether you will make any such application.

IN BANK.

MINCHIN and Others *against* COPE, Gent. one, &c.

Wednesday, Jan. 27th.

The Court will give leave to amend a record by inserting a special memorandum of the day when the plaintiff's bill was filed after a writ of error brought, upon payment of costs, the defendant being at liberty to plead *de novo*, upon terms. (*a*)

MINCHIN on a former day obtained a rule to show cause why the bill filed in vacation time against the defendant should not be amended by specially entitling it of the day on which it was filed, in-

(*a*) The Court of Common Pleas, however, will not, in a penal action, alter the term of which the declaration is entitled, in order to bring it within the time limited by statute for the commencement of the action. *Woodroffe v. Williams*, 6 *Taunt.* 19. 1 *Marsh.* Rep. 419. S. C.

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stead of being entitled generally of the Term. The affidavit stated, that the action was upon a bill of exchange which became due during *Easter* Term 1818; but the bill was not filed until the first of *April*, and this was after a writ of error had been brought. He referred to the case of *Dickinson* v. *Plaisted* (*b*).

Reader now shewed cause, and said he could not resist the rule, but submitted that it ought not to be absolute, except on terms favourable to the defendant. The action had been brought against the defendant as acceptor of an accommodation bill; but upon advice he suffered judgment to go by default, and after judgment signed he discovered the defect in the title of the bill filed by the plaintiffs, and therefore brought a writ of error. Under these circumstances, as the plaintiff applied to the Court for indulgence in amending the roll, the defendant ought to be permitted to plead *de novo*, having a good defence upon the merits. It was therefore for the Court to determine on what terms the rule should be made absolute.

The COURT said, that the rule ought to be made absolute on the defendant's paying the costs of the writ of error, but that the plaintiffs ought to have the costs of the judgment. They also thought that the defendant ought to plead immediately, accept short notice of trial, and give the plaintiffs judgment of the present Term. These conditions were but reasonable, inasmuch as the defendant had taken advantage of a slip of the plaintiffs unconnected with the merits, after he had previously suffered judgment to go by default.

Rule absolute on these terms.

(*b*) 7 T. R. 474.

DOE on the demise of ROBERTS and Wife *against* GIBBS and Wife.

Wednesday, Jan. 27th.

When the landlord is admitted to defend an action of ejectment, and the judgment is entered against the casual ejector with a stay of execution until further order, the lessor, before he takes out execution, must move the Court for leave to do so; and such rule is not absolute in the first instance. (*a*)

CHITTY moved for a rule to shew cause why, on the production of the *postea* and office copy of the rule for demanding possession of the tenant in possession, the plaintiff should not be at liberty to take out execution. He had understood that this motion was unnecessary in actions of ejectment where the landlord was admitted to defend; but he had since been informed, that the proceedings in an action of ejectment had been recently set aside for irregularity, for having omitted to make such a motion. If it had been laid down in the Treatises upon Ejectment, and in the books of practice, that where the landlord is admitted to defend the action, and the judgment is entered against the casual ejector, with a stay of execution until further order, the lessor, before he takes out execution, must move the Court for leave to do so; and if he sue out a

(*a*) See *Doe* dem. *Simons* v. *Masters*, post, 12 *Feb.* 1819. The proceedings in a case of this nature are governed by the stat. 11 *Geo.* 2 *c.* 19. *sec.* 13. which empowers a landlord to make himself defendant by joining with the tenant, if the latter will appear; and if he neglects to do so, it is then provided that judgment shall be signed against the casual ejector, for want of such appearance; but the Court may permit the landlord to appear, and order a stay of execution upon such judgment against the casual ejector, *until they shall make further order therein.* The landlord's consent rule, when he defends alone, therefore contains a clause to that effect, and it is necessary to move the Court for leave to take out execution. See *Stiles* v. *Oakes*, *Barnes*, 182. *Fenn* v. *Marriott*, id. 185. *Sykes* v. *Dawson*, id. 209. *Jones* v. *Edwards*, 2 *Stra.* 1241. *George* v. *Wisdom*, 2 *Burr.* 756. But as it appears from the two last cases that the landlord may shew cause, as that a writ of error has been allowed, it seems to be the practice of the Court of King's Bench to grant only a rule *nisi* in the first instance, and afterwards on affidavit of service, the rule is made absolute, unless sufficient cause be shewn. See the form of the rule *nisi*, *Tidd's* Forms, 4th ed. 756. But in the Court of Common Pleas the rule is absolute in the first instance. See *Imp.* C. P. 5th ed. 649. *Fenn* v. *Marriott*, *Barnes* 185. *Tidd's* Forms, 4th ed. 757.

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Doe *against* Gibbs.

writ of possession without such motion, the execution will be set aside for irregularity. It seemed to be but reasonable that this application should be made, lest the party should be taken by surprise, as he might show some ground why the execution should not issue. He cited *Tidd* Prac. (*a*) and *Adams* on Ejectment. (*b*) He apprehended that the rule must be made absolute in the first instance, according to the authority of the case *Fenn* v. *Marriott* (*c*).

Bayley J. after conferring with the Master, said, the Master considers that this application to the Court is necessary, and according to the authority cited from *Barnes* 182. referred to in Mr. *Adams'* Treatise on Ejectments (a very useful work), that seems to be the regular practice. The rule is, that when judgment is entered against the casual ejector, with a stay of execution until further order, there must be some further order. The lessor, therefore, before he takes out execution, must move the Court for leave to do so. The rule, it seems, is absolute in the first instance on the authority of the case of *Fenn* v. *Marriott* (*d*). Then you must take a rule according to the regular practice (*e*).

(*a*) 6th ed. 508. 1029. 1089. *Tidd's* Forms, 4th ed. 756.

(*b*) 2d ed. 301, 2.

(*c*) *Barn.* 185. And see *Stiles* v. *Oakes*, id. 182, 3. It may be collected.

(*d*) *Barnes* 185. *Stiles* v. *Oakes*, *Barnes* 182, 3.

(*e*) But the rule was drawn up *nisi*, and afterwards upon an affidavit of service upon the landlord, made absolute without opposition. See post, *Doe* dem. *Simons* v. *Masters*, 12th *Feb.* 1819. The rule *nisi* was in the following form: "Upon reading the rule made in this cause on *Wednesday* next after three weeks of the *Holy Trinity*, in *Trinity* Term last past, whereby *E. G.* and *F.* his wife made themselves defendants in the stead of the casual ejector, and another rule made on the same day, and the *postea* in this cause being produced and read, it is ordered, that the said *E. G.* and *F.* his wife, upon notice of this rule to be given to their attorney, shall upon *Wednesday* on the Morrow of the Purification of the Blessed Virgin *Mary* show cause why the lessor of the plaintiff should not be at liberty to sue out execution upon the judgment signed against the casual ejector, pursuant to the first mentioned rule. Upon the motion of Mr. ——. By the Court."

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WRIGHT AND OTHERS *v.* WELBIE.

Wednesday, Jan. 27th.

An averment in a declaration on a policy of insurance that *A. B. C. D.* and certain persons trading under the firm of Messrs. *E.* and *F. and Co.* were interested in the property is sufficient on a motion in arrest of judgment; but *quære*, whether the uncertainty as to the names of the persons who compose the firm is a ground of special demurrer? It is sufficient at the trial to prove that there is such a firm as Messrs. *E.* and *F.* and Co. without proving the names of the persons who compose the firm. A policy "to *any* port or ports in the *Baltic*" is legal, although some of those ports were then in a state of war with this country, and although no license has been obtained, provided the ship was not sailing to such hostile port. (*a*)

ASSUMPSIT on a policy of insurance, dated the 13th *August*, 1810, upon goods on board a *Swedish* ship called the *Magdalena* from *Gottenburg* to *any* port or ports in the Baltic. The declaration averred the interest to be in "*A. B.* and *C. D.* (stating their names) and certain persons trading under the firm of Messrs. *William* and *John Bell* and *Co.*" and that the policy was effected for the use of the said *A. B* and *C. D.* and said Messrs. *William* and *John Bell* and Co. At the trial before *Abbott C. J.* at the sittings after last Term at Guildhall a verdict was found for the plaintiff.

Chitty now moved for a rule to shew cause why a new trial should not be had, or why the judgment should not be arrested; and he made three points: 1st, That it was not proved at the trial who were the component members of the trading firm of Messrs. *William* and *John Bell* and Co. as described in the declaration; 2d, that the declaration did not sufficiently aver who were the persons interested in the goods insured; and 3d, that the voyage was illegal for want of a licence. Upon the first point he submitted that it was incumbent on the plaintiffs to prove all the members of the firm who traded under the description of Messrs. *William* and *John Bell* and *Co.* It was true that there was evidence given at the trial that there

(*a*) A policy allowing the vessel to trade to any ports within a particular district, which comprehends ports in a state of hostility, is lawful, unless it appears that a voyage to an enemy's country was in the contemplation of the insured. *Muller* v. *Thompson*, 2 *Campb.* 610. *Gill* v. *Dunlop*, 2 *Marsh.* 453. 7 *Taunt.* 204. Vide *Holland* v. *Hall*, 1 *B.* & *A.* 53. *Sewell* v. Royal Exchange Assurance Company, 4 *Taunt.* 856. *Bird* v. *Appleton*, 8 T. R. 562.

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was a mercantile house trading under the firm of Messrs. *William* and *John Bell* and Co. but the term *Co.* following the names given, it imported that there was some third person in the firm, but no evidence was offered to shew who that third person was, which the plaintiff was bound to do. For this he cited *Ord* v. *Portal.* (a) In an action against a third person undoubtedly this would not be an available objection, but between the parties on this record, the plaintiffs were bound to set out all the names of the persons trading under the firm of *William* and *John Bell* and *Co.* The only evidence at the trial was, that a house trading under the firm of *William* and *John Bell* and *Co.* had existed for ten years. The word *Co.* being a contraction of *company*, it was of very great importance to shew who were the persons comprehended under that word, because the addition of that word held out to the public a responsibility on the part of the firm in its engagements greater than the mere names that were mentioned would import. Therefore it was incumbent on the parties to shew who the other persons were who had contracted engagements under that firm. This was more particularly necessary in the case of a policy of insurance than in any other, because it must be shewn who were interested in the contract. In this case the evidence raised a presumption that there was some other person interested in this firm whose name was withheld from public cognizance. In support of this objection he referred to *Teed* v. *Elworthy.* (b) *Secondly*, the declaration in this case did not sufficiently aver who were the persons interested in the goods insured. It was clearly established to be absolutely necessary in a declaration upon a policy of insurance, to set out with certainty and with truth who were the persons inte-

(a) 3 *Campb.* 240. in the note.

(b) 14 *East.* 210.

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rested in the property insured. *Bell* v. *Ansley.* (a) *Cohen* v. *Hannam.* (b) The reason of this objection was extremely well founded, because the defendant should by the declaration be made acquainted with all the real parties to the contract, in order to prevent the injurious consequences which might result from an omission of this kind. Under the firm of *William* and *John Bell* and *Co.* an alien enemy might be interested, and he might be called even as a witness on the part of himself and the other plaintiffs; nay, under such an averment, one of the plaintiffs might be on the jury to try the cause. If this principle could be evaded the party might be allowed to put in the declaration certain persons trading under the firm of " such a one and Co." without giving any names at all. He submitted that it was a clearly established principle, that the names of all the persons interested in a contract should be set forth in the declaration. There was a decision of this Court, where it was held that a conviction on the Excise Laws against such a one " and company" could not be supported, (c) and therefore upon the principle recognised in this and the other decisions referred to, he submitted that this was a valid objection. *Thirdly,* it was submitted, that as the insurance was to *any* port or ports in the *Baltic,* and some of those ports were then in open war with this country, the voyage was illegal, no licence having been obtained, although in truth the ship sailed to a lawful port.

ABBOTT C. J. I am of opinion that we ought not to grant any rule in this case. The first ground on which this application is made is upon a supposed variance between the declaration and the evidence. The declaration averred the interest to be in *A. B.* and *C. D.* and

(a) 16 *East.* 141. (b) 5 *Taunt.* 101.
(c) *Rex* v. *Harrison* & *Co.* 8 T. R. 508.

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certain persons trading under the firm of *William* and *John Bell* and Co. I am clearly of opinion that the evidence offered and received at the trial was quite sufficient to support that allegation. Then it is said that the declaration is not sufficient, for not setting out the names of all the parties interested in the subject of the action, and that they ought to be specially named, and that naming them as persons trading under the firm of *William* and *John Bell* and Co. is not enough. The practice has long prevailed, of averring the interest in this way in declarations upon policies of insurance, and I am of opinion that it is quite enough so to do. If the question had been raised on special demurrer, perhaps it might be a subject of consideration. I do not say that there might not be some weight in the objection coming before us in that shape, but it is entitled to none now. The practice of pleading in this manner has long prevailed, and I think we ought not to arrest the judgment upon this ground, but leave the party to bring a writ of error, if he can avail himself of it. The third ground of objection is, that this voyage required a licence, for it is said, that by the terms of the policy the voyage is from *Gottenburg* to *any* port or ports in the *Baltic*, and that if the ship had sailed or had intended to sail to the port of an enemy, a licence would be necessary to legalize the voyage. Now there was no proof whatever of any such intention, or that she ever meant to sail to an enemy's port.

BAYLEY J. I am of the same opinion. As to the first point, I think that the allegation in the declaration is proved, because it is shewn that certain persons trading under the firm of *William* and *John Bell* and Co. were interested in the subject insured on behalf of themselves and any other partners, if such there were. The second question is, Whether we ought to arrest the judgment, on the ground that the names of the

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persons said to be interested are not stated? Now with reference to that objection, neither of the cases cited bears at all upon the subject. In one of those cases, the question of variance had arisen because the parties had misdescribed the interest. It was represented that the policy was effected for *A.* only, whereas it turned out that it was effected for *A.* and *B.* In another of the cases, the declaration averred that the interest was in two persons, but it omitted to name one of them, and therefore that case was decided on the ground of an obvious variance. The subsequent case of *Cohen* and *Hannam* proceeded entirely on the same ground, adopting the reasoning of the case of *Bell* v. *Ansley*. (*a*) All these cases, therefore, are out of the question. I see no objection to this declaration, on the ground that the plaintiff has described persons as interested trading under a particular firm, and not named them. If the defendant wanted to have known the names of these persons, the proper way to have raised this question would have been by special demurrer on that ground; but not having demurred, I think the objection is cured, and that he is now too late. The third objection is, that the policy being "to any port or ports of the Baltic," and the voyage being illegal to some ports, it must be illegal as to all, without a licence to go to the ports which happened to be in a state of hostility. Now, if the ship had gone to any of the other ports which were not in a state of hostility, it would not operate as any objection upon the face of the contract, nor does it in fact operate as any objection if the ship was going upon a voyage legal in its inception. I recollect a case very like this (*b*), where it was decided that the policy for a voyage to

(*a*) 16 *East.* 141.

(*a*) *Blackburn* v. *Thompson*, 15 *East* 81. 3 *Campb.* 61. S. C. Vide etiam *Muller* v. *Thompson*, 2 *Campb.* 610.

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St. Domingo, part of which was under *French* dominion in time of war, was not illegal, although described generally as a voyage to *Saint Domingo,* because the law would imply an exception in favour of that part of the voyage which was intended originally to be legal. For these reasons I think there is no ground made out for disturbing this verdict.

Holroyd J. I am entirely of the same opinion. With respect to the motion in arrest of judgment, upon the objection arising on the first point, I think it cannot be sustained, because if the declaration merely stated that certain persons traded under the firm calling themselves *William* and *John Bell* and Co. that would be a statement of sufficient certainty. It is to be recollected that they are not the parties to the suit, and that makes a distinction from the case where there are many parties on the record equally interested in the subject-matter of the cause. In this latter case it certainly would be necessary to state the names of the persons engaged in the particular firm, but not so in the present instance. With respect to the question of uncertainty as to the parties interested, there is a case of feoffment, in which it has been said, that in order that the Court may see what was conveyed so as to complete the feoffment, it was necessary to set out the names of all the parties to the feoffment; and so it was said in the case of an assignment or conveyance, where the conveyance took place by attornment; but it was held in both these cases, that the objections were cured by the verdict, and that the Court would presume that every thing was done to make it a legal feoffment in the one case, and a legal conveyance in the other. (*a*) At the same time, however, it was said, that the objec-

(*a*) See cases on this point collected in 1 *Saunders'* Rep. by Serjt. *Williams,* 228. *a.* note 1.

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tions might be available on demurrer, yet as the parties did not take the objection in that stage of the cause, it was then too late to take them, being made after a verdict; and certainly that was a very reasonable answer to the objections. The answer to the objection in this case is, that although the plaintiff has not stated upon the record all that he might have stated, yet he has stated the names of the parties with sufficient certainty, so as not to put the defendant to any inconvenience on the trial. It has been suggested, that an alien enemy might be one of the plaintiffs upon the record, under this general description of the firm. If the defendant thought he was deceived by the uncertainty of the declaration in this respect, he should have demurred to it on that ground; but as he has not done that, he must be taken to have waived his objection to the plaintiff's legal ground of action. The declaration, however, seems to me to be sufficiently supported. On the third and last ground, I concur with my Lord and my Brother Bayley in the opinion they have expressed, and consequently there is no sufficient reason suggested for disturbing this verdict.

BEST J. I have always understood it to be an invariable rule, that where all the averments necessary to a declaration are not sufficiently stated or are omitted, they are the subject-matter of demurrer, and that the time for taking advantage of such objections is before trial. Upon this principle I think the two objections that have been taken in arrest of judgment, come too late, even supposing they were available on demurrer. As to the third objection, if that could prevail, it seems to me that there is not one of the numerous cases in which immense sums have been engaged in *Baltic* risks, and have been actually paid, which must not have been improperly decided. I recollect from my own experience, when I was at the Bar, that in every one of

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the cases which were decided during the last war upon *Baltic* risks, the policies contained the very words in this case, "any port or ports in the *Baltic*," though many of those ports were in a state of hostility towards this country. If this objection could have prevailed, it is quite impossible that any voyage under a policy "to any port or ports in the *Baltic*" could ever become legal; and consequently, if a ship sailed to some one of these ports which happened to be in a state of hostility, the insurance on the ship could not be protected. It cannot be doubted, that after the policy is effected the voyage may be rendered legal by the licence of the king in council, and in such case there would be no objection to the policy. We know that during the last war these policies were effected before the voyage commenced; and even supposing the party were to go to a hostile port, there is nothing to prevent him from applying to government to obtain a licence. Certainly where a party bound himself under a policy to go to a hostile port without licence, he could not alter his course under the policy so effected. But the licence would render the voyage legal before its commencement. I think that being the case, a policy in these general terms cannot be evaded upon the objection taken; and that it signifies nothing that there were certain ports in the *Baltic* in a state of hostility, it being reasonably to be supposed that the party had it in his contemplation to obtain a licence for the voyage, or to abandon it. It happens in this case, that the voyage was legal, inasmuch as the party originally contemplated going to one of the ports of the *Baltic* which was not in a state of hostility; for although he undoubtedly intended to go to *Memel*, yet still that part of the voyage would not be a violation of the policy. I am therefore clearly of opinion that there is no pretence in this case for granting even a rule to shew cause.

Rule refused.

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IN BANK.

Thursday, Jan. 28th.

ROSCOE *v.* DELANO.

PRINCEP moved to change the venue in this case from *London* to *Lancaster*, on an affidavit which stated that the cause of action arose in the county of *Lancaster*, but it omitted to state what was the cause of action.

The Court will not change the venue, unless the affidavit states what the cause of action is, or it appears by producing the declaration, that the cause of action is of such a nature as to enable the defendant to change the venue. (*a*)

CURIÆ. The affidavit must state what the action is for; or you must produce the declaration, and shew that it is a transitory action, and not on a bill of exchange, or some other demand in actions for which the Court will not change the venue.

(*a*) In the King's Bench the rule for changing the venue is absolute in the first instance; and in that Court it is required, that all rules for changing the venue should be drawn up "upon reading the declaration, &c." a practice that was introduced in consequence of inconveniences having arisen from the venue being improperly changed without adverting to the cause of action. R. Trin. 49 *Geo.* 3. K. B. 11 *East.* 273. In the Common Pleas, the rule for changing the venue is in the first instance a rule *nisi*, and in that Court also it is the practice to draw up the rule "on inspecting the plaintiff's declaration, &c." *Tidd's* Forms, 4th ed., 257. See *Neale* v. *Neville*, *Saxony* v. *Spooner*, 6 *Taunt.* 567. *Powel* v. *Rich*, 7 *Taunt.* 178. 2 *Marsh.* Rep. 191. where the practice relative to changing the venue is much discussed.

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It is not necessary in an affidavit to hold to bail, that the creditor should himself swear to the debt. It is sufficient for another person to swear that the defendant is justly and truly indebted to the plaintiff, in order to hold the former to bail, even though the deponent does not describe himself in the affidavit to be the agent or servant of the plaintiff. (a)

KING v. LORD TURNER.

BALLANTINE moved for a rule to shew cause why the defendant in this case should not be discharged on filing common bail, and why the bail-bond should not be delivered up to be cancelled, and why all proceedings in the mean time should not be stayed on the ground of irregularity. The affidavit to hold to bail was made by a person named *Lettice*, without describing himself as agent, servant, or clerk, or in any way connecting himself with *King* the plaintiff, and the de-

(a) See *Brown* v. *Davis*, post 8th *Feb.* *Bland* v. *Drake*, post 12th *Feb.* 1 *Wils.* 339. 1 *Bos.* & *Pul.* 1. *Tidd*, 6th ed. 181. So an affidavit of truth of a plea in abatement may be made by a third person. *Tidd*, 6th ed. 677. *Pr. Reg.* 6. *Barnes* 344. In *Anderson* v. *Morgan*, 4 *Taunt.* Rep. 231. and *Pieters* v. *Luyties*, 1 *Bos.* & *Pul.* 1. it was held in the Court of Common Pleas, that the affidavit of debt might be made by a third person, and that the affidavit need not state that the deponent was connected with the plaintiff as agent, or in any other manner. In those cases however it appeared that the plaintiff was resident in a foreign country. In *Knight* v. *Keyte*, 1 *East's* Reports, 415. it was held that an affidavit to hold to bail, made by a person describing himself as the agent of the plaintiff, and stating that the defendant was indebted to the plaintiff, and that no tender had been made in Bank notes either to the principal or to the deponent, was held sufficient, although the plaintiff was not stated to reside abroad. The Court said, that the business might have passed entirely through the agent's hands, and it was impossible to say what means the agent might have had of satisfying himself of the facts sworn to. It had been determined in the Court of Common Pleas that the assignee of a bond may make an affidavit of debt without joining the assignor; and that if any tender of Bank notes be absolutely negatived, the affidavit will be good. *Byland* v. *King*, 7 *Taunt.* 275. 1 *Moore* 24. S. C. So in an action by the assignees of a bankrupt, an affidavit by the clerk to the plaintiff's attornies, absolutely denying a tender in Bank notes, was holden good, though it did not state that no tender had been made either to the bankrupt or his assignees, because the affidavit, being general, comprehended within it every particular, and therefore at most it was only a defect in point of form and cured by the statute 43 *Geo.* 3. c. 18. s. 2. unless the defendant produced an affidavit that the money had been actually offered to be paid in Bank of *England* notes. *Armstrong* v. *Stratton*, 7 *Taunt.* Rep. 405.

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ponent swore that the defendant was "justly and truly indebted to *John King* in a certain sum of money." This affidavit, he submitted, was defective on two grounds: 1st, because the deponent should have some way or other connected himself with the creditor; and 2dly, for swearing that the defendant was indebted to the plaintiff, the creditor himself being resident in town. He referred to *Elliott* v. *Duggan*.(a) He admitted that deponent negatived the tender of any notes of the Governor and Company of the Bank of *England*.

ABBOTT C. J. I know of no case in which it has been held that the creditor himself must swear to the debt. The case cited has reference entirely to the negation of any tender of any notes of the Bank of *England*, and therefore that case does not bear upon this point.

BAYLEY J. I think this affidavit will do. There are many cases where the plaintiff himself cannot swear to the debt, for a variety of reasons. It may be true that it does not appear in what relation this person named *Lettice* stands to the plaintiff, nor need it, for the deponent would be liable to an indictment for perjury upon this affidavit. There was a series of cases in which it was held, that unless you negative the tender in Bank of *England* notes, the defendant was liable to be discharged; and it was also held, that that negation of the tender must be by the plaintiff only. That seems to be otherwise now. There is another Act of Parliament besides the 37 *Geo.* 3. c. 45.(b) which directs, that if the affidavit to hold bail does not nega-

(a) 2 *East*. Rep. 24.

(b) 43 *Geo*. 3. *c*. 18. *sec*. 2. which cures informalities in this part of the affidavit, but not a total omission of the clause negativing a tender. *Wood* v. *Jenkins*, 2 *Smith* Rep. 156. *Tidd*, 6th ed. 193.

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tive the tender, it is competent for you to come afterwards and apply to the Court, and swear that there has been a tender; but you cannot swear that in this case.

HOLROYD J. concurred.

BEST J. You cannot object to the affidavit to hold to bail in this case, unless you swear that there has been a tender.

Rule refused.

Friday, Jan. 29th.

WICKES *qui tam* v. GORDON.

In an action upon the 7 *G.* 2. c. 8. § 8. to recover penalties for stock-jobbing, it was averred in the declaration, that the contract to transfer the stock was made for the 27th of *February*, and it was held that as the parties meant the settling day which was fixed for the 27th of *February*, it was no variance (*a*)

THIS was an action of debt to recover penalties under the 7 *Geo.* 2 c. 8. s. 8. for stock-jobbing. The second count of the declaration upon which the verdict

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(*a*) The general rule seems to be, that where the statement in the declaration and the statement in the contract will be both satisfied by the same proof, the declaration is sufficient. Where a contract was made for the sale of tallow, warranted ready for delivery from ship or warehouse by a particular time, this was held equivalent to a general contract for delivery at the time specified, and therefore it was held that the places of delivery mentioned in the contract need not be averred. *Thornton* v. *Jones*, 6 *Taunt.* 581. 2 *Marsh.* Rep. 287. A contract for the purchase of goods, the exact amount of which not being known at the time, is described in the contract as about 8 tons, may be declared upon under a videlicet as a contract for 8 tons, which was ascertained to be the quantity. *Gladstone* v. *Neale*, 13 *East.* 410. So a contract to furnish goods at a price stated in the order as 24*s.* *a.* 26*s.* may be described as a contract to furnish them at a reasonable sum. *Laing* v. *Fidgeon*, 6 *Taunt.* 108. Alternative contracts must be stated according to the fact; and where a contract was made for the purchase of 100 bags of wheat, 40 or 50 of which were to be delivered on one market day, and the remainder on the next market day, it was held that the plaintiff could not declare as upon an absolute contract for the delivery of 40 bags on the first day, though 40 bags were then in fact delivered, but the contract must be stated in the alternative according to the original terms. *Penny* v. *Porter*,

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was found stated, "That after the passing of the said act, to wit on, &c. at &c. it was contracted and agreed by and between said defendant and one *Joseph Lightfoot*, that defendant should sell to said *Joseph Lightfoot*, and that said *Joseph Lightfoot* should buy of said defendant, a certain other interest or share in a public stock, to wit other 5000*l*. in the public stock commonly called the three pounds per centum consolidated bank annuities, and that said last mentioned 5000*l*. should be transferred by defendant to said *Joseph Lightfoot*, "*on the 27th February*," in the year last aforesaid; and said plaintiff avers, that defendant was not, at the time of making said last mentioned contract and agreement as last aforesaid, actually possessed of or entitled unto said interest or share in said last mentioned public stock so agreed to be sold and transferred by him as last aforesaid in his own name or in his own right, or in the name or names of a trustee or trustees to or for his said defendant's use, or his own right, contrary, &c. whereby and by force, &c. defendant forfeited for his said offence 500*l*. and thereby and by force, &c. an action hath accrued to plaintiff to demand and have of and from defendant said 500*l*. so forfeited as aforesaid." At the trial before *Abbott J*. at the sittings after last *Trinity* Term at *Guildhall*, the plaintiff had a verdict.

In *Michaelmas* Term last, *Topping* moved for a rule to shew cause why the verdict should not be set aside

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2 *East*. 2. and see 8 *East*. 8. If a contract to deliver soil be declared upon as a contract to deliver soil or breeze, the variance will be fatal, if it appear that soil and breeze are different things. *Cook* v. *Munstone*, 1 New Rep. 351. 5 *Esp*. 239. When a contract is made to remove goods in a month, and it is stated in the declaration as an agreement to remove in a reasonable time, the variance is fatal. *Hore* v. *Milner*, *Peake's* Rep. 42. In *Waugh* v. *Bussell*, 1 *Marsh*. Rep. 217. Ld. Ch. J. *Gibbs* said, "When you declare on a deed you state the legal effect of it; and you may declare without using a word which is contained in the deed, except the names of the parties and the sum."

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and a nonsuit entered on the ground of a variance, the declaration averring that the contract was made "for the 27th of *February*," whereas the evidence in support of the declaration was, that it was made for "the settling day," which last, though it in fact happened on the 27th of *February*, was still a fatal objection to the declaration.

Abbott C. J. now read the report of the evidence; and, according to his Lordship's notes, it appeared that the contracting parties had talked of a bargain "for the 27th of *February*," or "the settling day," the witness being uncertain which day was named, but he was positive that they meant the same day.

Gurney now shewed cause against the rule, and contended that there was no variance in the case, for even supposing it to be uncertain whether the 27th of *February*, or the settling day, was mentioned, still as the 27th of *February* happened on the settling day, and as both parties meant the same day, the terms were convertible and equally satisfied the averment in the declaration. It might as well be said that where a declaration averred a particular transaction to have happened on the 25th of *March*, whereas in proof it happened on *Lady-day*, which every body knew to be the 25th of *March*, that this was a variance. The argument in the present case was just of the same description, and would equally be unavailing.

Topping and *Chitty* contrà. The case put of the 25th of *March* and *Lady-day* is by no means parallel with the present case, because the 25th of *March* or *Lady-day*, is a known and fixed day to all mankind, as synonimous to each other, and never varies. If the settling day was necessarily a fixed day, and meant the 27th of *February*, and was not subject to any varia-

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tion from circumstances, it would be an answer to the objection. But the Court will not take notice of the settling day as meaning the 27th of *February*, because what is called a settling day in the language of stock-brokers is liable to variation from the fluctuation and changes of the public funds, and the determination of the Committee of the Stock Exchange. It is impossible from the nature of the subject, that the settling day should mean a given and fixed day of the month, because, as it depends on the state of the funds on a particular day, as well as upon other collateral circumstances, it cannot be fixed with any degree of certainty. It is well known that the Stock Exchange Committee may at its meetings alter the day which may have been previously fixed for settling accounts. A sudden public calamity, such for instance as the death of any member of the royal family, may cause an alteration in the settling day. The bargain described in the declaration depended not so much upon the day therein stated as the day which should be fixed upon for the settling day, and therefore the materiality of the variance is obvious. This is not like a fixed period which is known to all mankind, and recognised for the purpose of governing their transactions. It is totally dissimilar from the 25th of *March*, which is a regular fixed division of the year. It cannot certainly be contended that if the contract had been made for the 27th of *February*, and any public calamity had happened so as to occasion an alteration in the settling day, that that would vacate the bargain, but still that admission does not at all touch the present argument. If the contract is made for the settling day, the party would take the chance of the settling day happening on the 27th of *February*. The bargain depends upon the variation of the time at which they would be called upon to take to it, and if the settling day is altered, which it may be for the reasons suggested, the bargain would enure to take

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effect on that day without reference to the 27th of *February*. The parties therefore must take the chance of its being postponed or interrupted by a variety of contingencies. This case cannot be distinguished from *Paynde* v. *Hayes*, (a) referred to by Mr. Justice *Buller*, in his Treatise on the Law of Nisi Prius, (b) where the contract declared on was to deliver stock on the 22d of *August*; and upon the trial by the entry in the broker's book it appeared that it was a contract for the *opening*, though it was proved to be notorious that the books were to open the 22d; and the broker swore he took the 22d of *August* and the opening to be convertible terms, and yet the Court held this to be a fatal variance, and nonsuited the plaintiff. It is to be recollected that this is a penal action, and the Court always holds parties more strictly to their proof in such cases than in mere questions of civil right, and therefore in this case the Court will treat this objection more favourably than in any other. In furtherance of their argument they referred to *Harrison* v. *Wilson*, (c) and the *King* v. *Cassano*. (d) *Chitty* said, in the course of the argument, that, according to his note of the evidence, "the settling day" was the only day named between the parties.

ABBOTT C. J. We must be bound by the report of the evidence as it appears upon the Judge's notes. This application is made on the ground of a supposed variance between the declaration and the evidence, and the attention of the Court is to be directed in this action (by which the plaintiff seeks to recover a penalty upon a contract for the purchase of a certain quantity of stock on a particular day) to the real sense and meaning of the parties at the time the contract was entered

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(a) Referred to as in *Stra.* 74.; but meaning Select Cases on Evidence, p. 74.

(b) *Bul.* N. P. 145. (c) 2 *Esp.* 708. (d) *Esp.* 231.

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into. The question is, whether the evidence produced proved the contract or varied from it. The contract laid in the declaration is for a particular day, namely, the 27th of *February*. The proof in evidence was, in the first instance, that that was the day named. The witness who gave that proof being further pressed, said, " I don't know whether the 27th of *February* or the settling day was named, but they meant the same thing." Therefore, it really comes to this single question, whether the parties may not be allowed to use one phrase or the other. They both understand the same thing, whatever phrase is used. It is alleged in support of the objection, that this day, called " the settling day," was subject to variation, and might be afterwards altered. There is no proof of that, and we must consider that notion as completely out of the case. I know of no authority existing in the Committee of the Stock Exchange to alter the settling day; on the contrary, I should hold that if the Committee of the Stock Exchange resolved to alter the settling day, nobody who did not consent to it would be bound by it. If parties make a contract upon a day understood between them to be a day for certain purposes, and that day is previously named, I know of no authority that could substitute another for it. It is not suggested that the defendant is in any manner taken by surprise on this occasion. The proof given is that the denominations of time were understood to apply to one and the same day, and being understood by the parties to apply to one and the same day, how can it be suggested now that they meant a different thing? The witness says, " that the 27th of *February* and the settling day were used indifferently;" and he adds, " the 27th of *February* was mentioned, I have no doubt." The Court has been pressed by the authority of a decision which no doubt is directly in point, and every weight that can be given to such an authority in the present case must be given

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to it. But although that case exists in a book of high authority, and might be applicable to the transactions of persons who lived nearer to the time at which it was decided, yet we ought not to consider that as a precedent or authority for our direction, or for the direction of future times. We ought to apply our own judgment and reason to the question before us, and it seems to me that there is no variance whatever in this case.

Bayley J. The rule of pleading is, that you are to state the contract, not in the terms in which it is expressed, but according to its legal operation, and if the evidence proves the contract, it is good. Here the declaration describes a contract for delivering stock on the 27th of *February*. The evidence was, that it was a contract for delivery either on the 27th of *February* or the settling day. It matters not at all in what terms the day is expressed in the declaration, if the parties meant the same thing. At the time the contract was entered into, the 27th of *February* was known to be the settling day, and whether you express it by the name of the settling day, or as the 27th of *February*, it is the same thing.

Holroyd J. I am of the same opinion. It appears to me that the contract is proved so as to satisfy the terms of the declaration; and whether the expression was "settling day" or "the 27th of *February*" is wholly immaterial, because it seems to me, upon the evidence, they both exactly mean the same thing. The settling day was at that time understood by both parties, according to the evidence, to mean the 27th of *February*, and I by no means accede to what has been said in argument as to the settling day being changed. I am of opinion, that as this contract was entered into for the transfer of the stock on the 27th of *February*,

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and as it was clearly understood at the time the contract was entered into, that the 27th of *February* was the settling day, it makes no sort of difference in the legal effect of the pleading. With respect to pleading written contracts according to their contents, or rather according to their words, I agree with my Brother *Bayley*, that the legal effect is the material thing to attend to; for it very frequently happens, if the pleader declares in the terms used in the instrument, that the evidence, when produced, will not support the declaration. For instance, if a party plead a deed of lease and release, and the deed does not operate in the way in which he expects to find it; and if issue is taken upon it, and he does not establish what is alleged, he involves himself in a difficulty, which might not be found if he merely averred the legal effect of the instrument. In such a case, he ought merely to plead "that the party released," and leave out the technical words that are put into a conveyance for the sake of form; because, if those words will not operate in one way, they may operate in another, and the party by using them, though merely matter of form, and foreign to his object, may find it necessary to prove them, and if he fails in so doing, he may be nonsuited. The most correct way of pleading is, to plead the words according to their legal effect, instead of adopting the words used, which is not always safe. (*a*)

BEST J. There is no evidence before us as to what is the meaning of the settling day; nor do we know whether the Committee of the Stock Exchange have the power of altering that day. With respect to the supposed variance, it is quite certain what the parties meant; and whether they meant the 27th of *February*

(*a*) S. P. 2 *Saund.* Rep. by Mr. Serjt. *Williams*, p. 97. *b.* note 2. *Com.* Dig. Pleader, C. 37. *Co. Litt.* 49. *a.* n. 1.

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or the settling day is precisely the same thing, because they are convertible terms; and the Stock Exchange would exercise a legislative authority beyond that which parliament itself possesses, if they could alter a contract between private parties.

Rule discharged.

Friday, Jan. 29th.

THE KING v. SHERIFF OF LONDON, *in a Cause of* TODD v. JACOB.

An attachment issued against the Sheriff for not bringing in the body, the Sheriff having taken no bail bond from the defendant. The latter applied to set aside the attachment upon an affidavit of merits and upon payment of costs, but the Court held that such an application could not be entertained. (*a*)

IN this case an attachment had been issued against the Sheriffs of *London* for not bringing in the body of the defendant, it appearing that they had neglected to take a bail bond; and on the first day of Term, *Comyn* moved to set it aside for irregularity.

Bolland now shewed cause against the rule, and contended, that as this application was made by the defendant, the Court could not entertain it, not being at the instance of the sheriff. No bail bond having been taken by the latter, the defendant could not be said to have a *locus standi in curiâ.* The attachment had gone against the sheriff for a breach of his duty in not bringing in the body, and therefore the plaintiff had nothing to do with the defendant, the sheriff being now, in fact, the responsible party. By the rule of Court made last Term (*b*), it was ordered, that no rule should be drawn up for set-

(*a*) See *Fuller* & *Prest.* 7 T. R. 109. from which it appears, that where the sheriff has been guilty of a breach of duty in suffering a defendant to go at large, on an undertaking to appear without taking a bail bond, and an action for an escape has been brought against him, and bail above were not put in in due time, the Court will not relieve him by permitting him to put in and justify bail afterwards. *Moses* v. *Norris*, 4 *M.* & *S.* 397. 2 *Marsh.* 263. but see 1 *Price* R. 103.

(*b*) Reg. Gen. *Mich.* T. 59 *Geo.* 3. 2 *B.* & *A.* 240.

ting aside an attachment regularly obtained against a sheriff for not bringing in the body, unless the application for such rule shall be grounded upon an affidavit shewing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff, (as the case may be) at his or their own expense, and for his or their *only* indemnity, and without collusion with the original defendant. Now here there was no affidavit that this application was made on the part of the sheriff, and certainly it could not be on behalf of the bail, because no bail bond had been given. Under such circumstances the Court would not entertain such a motion on the part of the defendant, who was really not before the Court.

Comyn, in support of the motion for setting aside the attachment. The rule of Court itself declares, that an attachment against the sheriff may be set aside if made on the part of the original defendant, grounded upon an affidavit of merits. This was an application on the part of the original defendant, who now offered an affidavit of merits. The action was brought against the defendant, as acceptor of a bill of exchange given for goods sold and delivered, but he had since become bankrupt. This application was virtually made against the sheriff, who had neglected to take a bail bond. The Court would look to see whether the sheriff had done his duty, but in fact he had done nothing. The defendant now endeavoured to rectify a mistake into which the sheriff had fallen, and only desired to set aside the attachment upon payment of costs, in order that he might be let in to defend the action, upon an affidavit of merits; and certainly the motion was for the benefit of the sheriff.

ABBOTT C. J. It is very true that in general, where the defendant applies to set aside the attachment against the sheriff, he does so because he has given a bond to the

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THE KING against SHERIFF OF LONDON.

sheriff, but having forfeited it, he wishes to relieve himself from the consequences. But here no bond has been given to the sheriff, and therefore I am anxious to know why the defendant makes this application to the Court. I cannot but consider this application, though made in the name of the defendant, as an application for the sheriff or the sheriff's officer.

BAYLEY J. If the defendant will not have to pay the debt ultimately, why should he apply to set aside the attachment? He might have been liable to the sheriff, but the plaintiff could never recover the debt from the defendant, no bail bond ever having been given.

HOLROYD J. If there is no bail bond, what right has the defendant to come and claim relief against the sheriff, when the defendant himself cannot be injured? for if the sheriff has not done his duty, he is liable to an action for an escape. Whatever may be the consequences to him for having neglected his duty, he cannot recover against the defendant. Then what right has the defendant to come here?

BEST J. concurred in thinking that the defendant had no right to make this application.

Rule discharged with Costs.

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SNELLGROVE and another, Assignees of WHITE a Bankrupt, *against* HUNT.

Friday, Jan. 29th.

In an action of assumpsit at the suit of assignees, it is necessary that they should all join; and if the action be brought at the suit of two assignees, when it appears that the promises were made to three, the plaintiffs will be nonsuited.

ASSUMPSIT on a bill of exchange drawn the 16th of *January* 1818, payable four months after date, for £100. to the order of *Bartholomew White* the bankrupt, and accepted by the defendant. The declaration alleged the promises to be made to the assignees of the bankrupt. At the trial before *Abbott*, C. J. at the sittings after last Term at *Guildhall*, it appeared in evidence that the commission issued against the bankrupt was dated on the 7th of *March* 1818; that the bill of exchange in question was due on the 19th of *May* following; that there were three assignees appointed under the commission, two only of which joined in the present action. Under these circumstances, it was objected on the part of the defendant, that all the assignees should have joined in the action, inasmuch as the action was founded entirely upon promises to all. The case of *Bloxam* v. *Hubbard* (a), was cited as an express authority; and the Chief Justice acquiescing in the objection, the plaintiffs were nonsuited.

F. Pollock now moved for a rule to shew cause why the nonsuit should not be set aside, and a new

(a) 5 *East*. Rep. 407. In that case it was held, that an order of the Lord Chancellor made under the statute 5 *Geo*. 2. c. 30. upon the petition of the creditors for removing one of several assignees of a bankrupt's estate not followed up by any reassignment or release of such assignee to the remaining assignees, nor by any new assignment of the Commissioners under the Lord Chancellor's order, did not operate to divest the legal estate out of such removed assignee, and consequently he ought to join in an action of trover brought by the assignees for a ship belonging to the bankrupt's estate. But it was held, that in an action of trover advantage could only be taken of the nonjoinder by a plea in abatement, and that the other assignees could recover their proportional parts.

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trial granted. The question in this case is, whether two assignees out of three may not lawfully sue, inasmuch as they sue in a representative character. Undoubtedly it must be admitted that the declaration in this case is founded entirely upon promises made to the assignees of the bankrupt generally. But this case may not be considered as distinguishable from the case of executors, who may sue without joining all the executors named in the will. This objection however, it must be confessed, had some strong authorities in support of it, and after looking more accurately at the pleadings, it is to be feared that the declaration cannot be supported. It cannot be doubted that there is a distinction between *tort* and *assumpsit*. In the former species of action it is competent for one of several persons jointly interested to bring the action, and the defendant can only take advantage of the objection by a plea in abatement, but in the latter he may avail himself of it on *non assumpsit*. In the case of *Bloxam* v. *Hubbard* (a), which was an action of trover, in which only three out of four assignees joined, and a similar objection being taken, Lord *Ellenborough C. J.* said, "Assuming it to be well founded, and we think it so, it has only the effect of precluding the plaintiffs, who are three out of the four assignees, in whom the property of the ship originally was vested, from recovering more than their three-fourth parts in value of the property in question. For, it is now too well settled, to be any longer disputed in a court of law, that the defendant can only avail himself of an objection of this sort, viz. that all the several part owners in a chattel have not joined in an action of trespass or of tort brought in respect to it by plea in abatement." Upon the same principle this case does not come within the ordinary

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(a) 5 *East. Rep.* 407.

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rule which applies where executors declare without being all joined in the action. The Chief Justice at the trial certainly asked whether the averment in this declaration could be established by the evidence upon any decided authority. Expecting that it might be brought to correspond with the principle of the case of executors, it was contended on that occasion, that the objection taken to the declaration was not available; but upon consideration it must be acknowledged that it does not fall within that principle, because the implied promises would be to all the assignees, whereas the promises averred in the declaration are only to two of them. Probably, however, the Court would think that what is said in a Note of Serjeant *Williams*, in his edition of *Saunders's* Reports (*a*), is not inapplicable to the present case. What he says is this: "With respect to contracts not under seal, whether in writing or by parol, a distinction has been taken between *actions of assumpsit* and *actions of tort*; in the former case, if one only of several persons who ought to join bring the action, the defendant may take advantage of it on *non assumpsit*, but in the latter he must plead it in *abatement*. And this distinction is universally adopted. However, it may not be improper to observe as to *assumpsit* by one only, that at the time when most of the cases upon this subject were decided, the same rule extended as well to *defendants* as to *plaintiffs*. The rule in both cases was founded upon the same reason that the contract proved was not the same with that in the declaration. But as soon as it was decided in the case of *Rice* v. *Shute* (*b*), and the other cases which followed it, that leaving out one of the joint contractors did not vary the contract, one would have thought that the same principle would be applied to the case of persons with whom the con-

(*a*) 1 *Saund.* Rep. by *Serj. Williams*, 4th ed. 291 g. note 2.
(*b*) 5 *Barr*, 2611. 2 *Bla.* R. 947.

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Snellgrove *against* Hunt.

tract was made. If the contract be still the same, notwithstanding one of the persons who ought to be made co-defendant is omitted, upon what principle is it that the contract is not the same, if one of the persons who ought to be co-plaintiff be omitted? Perhaps it may be objected, that by this means the plaintiff and the defendant are not upon equal terms; that in an action against one only, he necessarily knows all the persons liable; but in an action by one only, the defendant may often not know nor be able to know, what persons ought to join. But in answer to this, it should always be remembered that the rule is founded upon the supposed variance between the contract proved and the contract laid, and not upon any inconvenience or convenience to the parties. As to the knowing of the persons, the cases above referred to, respecting *defendants*, have decided that this circumstance is immaterial; and as to the convenience or inconvenience of the thing, it should seem more convenient that the parties should, after issue joined, proceed upon the merits, than that the defendant should be allowed to nonsuit the plaintiff upon a mere matter of form. However the settled distinction is, as I have before mentioned, *and it must be left to the operation of time, and the same good sense as at last prevailed in* Rice v. Shute, *respecting defendants, to do away a distinction which seems to me to have no principle for its foundation.*" It is to be feared that that period has not yet arrived, and it is probable that this learned person did not know how much he had to contend with.

Abbott C. J. I have a great respect for that learned writer, and no man entertains more respect for his opinions than I do, but I think that there is very great reason for the distinction which he seems to contend against. The plaintiff knows or ought to know who are his own partners in a transaction, but he may not be able to ascertain how many persons are liable

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SNELLGROVE against HUNT.

to be sued jointly; consequently, the omission of a party who ought to have been a co-plaintiff is a ground of nonsuit; but the omission to make a party a defendant can only be taken advantage of by plea in abatement. I think this declaration is clearly bad.

BAYLEY J. I am of the same opinion. The declaration in this case is founded entirely upon promises to the assignees, and therefore they ought all to join.

HOLROYD J. In the case of bonds or deeds, it has been held, that the obligees or covenantees, if alive, ought to join in the action, and if dead that fact should be averred in the declaration. (a)

BEST J. concurred in the opinion of the other Judges.

Rule refused.

(a) 5 Rep. 18. b. *Slingsby's* case.

IN BAIL COURT.—COULSON *against* SCOTT and Wife.

Saturday, Jan. 30th.

In action against husband and wife, when the husband alone has been arrested, bail may justify for him only on his filing common bail for his wife.

IN this case bailable process had been issued against the husband and his wife for the debt of the wife before marriage; and the husband only was arrested, and was now in custody.

Chitty moved to justify bail for the husband only, which was opposed by *Thessiger*, on the ground that in an action against husband and wife where the husband only is arrested, he shall put in special bail for his wife as well as himself, according to the note on rule *East.* 5 Geo. 2. But *Chitty* submitted that it was only necessary to put in special bail for husband and wife where both are arrested, according to the practice laid down

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Coulson *against* Scott.

in *Crooks* v. *Fry* and wife, 1 *Barn.* and *Ald.* Rep. 165. and in the present case the husband alone had been arrested.

Best J. said that he would consult the other Judges; and afterwards in full Court stated that it was sufficient for the bail to justify for the husband only, but that he must file common bail for his wife, and that the rule for the allowance of bail must be drawn up conditionally accordingly.

Rufford's Bail.

Saturday, Jan. 30th.

Time not allowed to correct misnomer in notice of justification of bail by habeas corpus.(a)

WALFORD moved in this case for leave to amend the notice of bail, by altering the name of one of the bail from *Appleby* to *Uppleby*, the latter being the right name. But the Court being informed that the bail was by habeas corpus, and as the habeas corpus

(a) In case of bail by *habeas corpus*, or writ of error, time to justify is not in general allowed for amending a defect in the notice of bail, &c. on account of the delay. *Tidd*, 6th ed. 269. *Darcey's* bail upon *habeas corpus*, *Hil.* T. 23d *Jan.* 1817. *E. Lawes* in support of bail. *V. Lawes* in opposition. Per *Abbott* J. The description of bail as a gentleman, when it appears he has recently been a butcher and is about to set up again in that trade, is insufficient, and though the bail have been found, yet the objection is not aided. And as the bail are on a *habeas corpus*, time cannot be granted. *Ward* v. *Johnson*, in the Bail Court, *Mich* T. 6th *Nov.* 1818. Coram. *Holroyd* J. Notice of bail and justification was served at a quarter before eight on the 4th of *November*, by putting through the door of the office of the plaintiff's attorney, and the affidavit of the service of notice of justification stated this fact, and that the defendant's attorney on the next day applied to the plaintiff's attorney to acknowledge the receipt of the notice, but that the latter refused to admit the same, whereupon defendant's attorney served another notice for this day; but the second notice being served too late, *Chitty* moved for time, but Mr. Justice *Holroyd* ruled, that as this was a case of bail on *habeas corpus*, no time could be given. *Atkins'* bail in error, *Easter* Term, *April* 1815. *Espinasse* moved for time to justify the bail, but per *Bayley* J. time is never allowed to justify bail in error.

was not annexed to the bail-piece, said that the practice was not to allow time to amend irregularity in such case.

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RUFFORD'S BAIL.

SAUNDERS'S BAIL.

Saturday, Jan. 30th.

Service of notice of justification by leaving it at chambers of plaintiff's attorney is bad.(*a*) But if the plaintiff's attorney has since acknowledged the receipt, that will suffice. (*b*)

THE affidavit of service of notice of justification in this case only stated that the notice was "left at the chambers of the plaintiff's attorney by putting it into the letter-box, no person being there to receive it."

BEST J. The notice must be served upon some person in the office of the attorney, and the objection cannot be cured without an acknowledgment that it was received.

(*a*) See the next case. The rule of K. B *Hil.* T. 8 *Geo.* 3. directs that an alphabetical book shall be kept in the Master's office in K. B. Walk, to be inspected without fee; and that every attorney practising in this Court, and residing in *London* or *Westminster*, or within ten miles, shall enter his name and place of abode, or other proper place in *London* or *Westminster*, where he may be served with notices, &c. and that notices, &c. which do not require a personal service shall be deemed sufficiently served on such attorney if a copy be left at the place lastly entered in the book *with any person resident at or belonging to such place*, and that if the attorney neglect to make the entry, then fixing up the notice in the Master's office shall be deemed sufficient service. By rule *M. T.* 41 *Geo.* 3. K. B. it is ordered that no rules, orders, or notices in any cause or matter depending in this Court shall be served, or any proceedings or pleadings delivered or served later than ten o'clock at night, and that any service or delivery thereof after that hour shall be null and void. 1 *East.* 132. *Tidd*, 6th ed. 62. In C. P. services must be made before nine o'clock. *Chapell* v. *Parker*, 2 *Taunt.* 48. 3 *Taunt.* 234. *Arrowsmith* v. *Ingle.*

(*b*) *Bailey* v. *Davy.* In Bail Court, 6th *Nov.* 1818. Notice of bail was served in due time by leaving it at the office of plaintiff's attorney, who returned it the next day in a letter, saying, that he should not accept the notice because he had taken an assignment of the bail bond; but the letter did not state the time when the notice was received. *Chitty* submitted that this was a sufficient acknowledgment to render the service of the notice sufficient; and Mr. Justice *Holroyd* ruled accordingly, and the bail justified.

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Saturday, Jan. 30th.

*FOWLER'S BAIL.

Notice of the justification of bail must be personally served upon the plaintiff's attorney, or some clerk or servant in his office, and an affidavit that the door of his office was shut, and that the notice was left before 10 o'clock at night, will not suffice.(a)

THE notice of justification of the bail in this case, by original, was served at a quarter past nine o'clock last night at the chambers of the plaintiff's attorney, but the door being shut, and no person therein, it was put into the letter-box.

Campbell moved to justify the bail under such a notice, which he contended he might do, for by the practice of this Court the defendant had till 10 o'clock at night to serve his notice. It was the duty of the plaintiff's attorney to keep his chambers open until that hour, and therefore he submitted that putting the notice into the letter-box was equivalent to a personal service. These were only bail of whom the plaintiff's attorney had had former notice. If the defendant was not allowed to justify his bail under these circumstances, having done every thing that the practice of the Court required him to do, it would be imposing upon him a very great hardship; for the plaintiff's attorney might shut up his chambers the whole day, and it would be impossible therefore to prove personal service. He confessed that he did not want time, but it was fit that the practice of the Court should be settled one way or the other.

BEST J. having inquired of the Master what the practice was in such cases, said—It strikes me that this service ought to suffice, but I find that the usual practice is to give further time in such cases to serve fresh

(a) See the last Case and note.

notice in more seasonable hours of business; and as you say you do not want time, that is an additional argument for requiring fresh notice. I am afraid I cannot allow the bail to justify.

HALL'S BAIL.

Saturday, Jan. 30th.

The same point and endeavour to obtain acknowledgment, not sufficient; bail-piece not entitled of the court, or in the cause irregular; but the court will give time to amend.(a)

BAIL by affidavit. It appeared by the affidavit that the service of the notice of justification was by leaving it at the chambers of the plaintiff's attorneys, no person being therein, and that the deponent had two days afterwards called at the attorneys' chambers for an ackowledgment of the notice, but was unable to obtain any information upon the subject. *Chitty* moved to justify the bail under these circumstances, submitting that the service was sufficient.

BEST J. however held it bad; and the Master having suggested another objection, viz. that the bail-piece was not entitled of the Court or in the cause, the bail were not permitted to justify, but a week's time to serve fresh notice and prepare a fresh bail-piece was given, the proceedings having been sent up from *Nottingham*.

(a) The bail-piece is made out by the defendant's attorney, and stamped with a half crown stamp, 55 *Geo.* 3. *c.* 184. sched. part 2. and should be entitled of the Court and Term, (*Tidd*, 6th ed. 255.) and state the county into which the writ issued. *Smith* v. *Miller*, 7 *T. R.* 96. *The King* v. *Smith*, 3 *M.* & *S.* 532. and the names of the parties, together with the names and additions of the bail, and the sum sworn to, and the day it was taken, and the person before whom it was acknowledged. *Tidd's* Forms, 4th ed. 112. But if bail be put in in the county where the defendant is arrested upon a *testatum capias*, it is not a nullity if the county whence the *testatum* issued appear in the margin of the bail-piece. *The King* v. *Sheriff of Middlesex*, 3 *M.* & *S.* 532.

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Saturday, Jan. 30th.

Application against defendant's attorney for costs of opposing bail changed vexatiously.—Referred to the master.(b)

STEER v. SMITH.(a)

ANDREWS moved for a rule calling upon the defendant's attorney to shew cause why he should not pay the plaintiff's attorney the costs of former oppositions to bail under the following vexatious circumstances. The action had been brought in the Mayor's Court, and was removed into K. B. In the vacation notice of bail was given to justify before *Best J.* at chambers, but his Lordship was of opinion, that under the statute 43 *Geo.* 3. c. 46. he had no authority to take the bail. Notwithstanding this decision, the defendant's attorney gave two other notices in vacation of the same bail to justify before other Judges of this Court at chambers, when the plaintiff's attorney again attended, and the bail were rejected on the same ground. The plaintiff's attorney then received another notice for the justification of the same bail for the first day of Term, but the bail did not come up on that day, although the plaintiff's attorney had instructed counsel to oppose. A fresh notice of the same bail was then served for the third day of the Term, when the bail did attend. Before they were permitted to justify, application was made to *Holroyd J.* who sat in the Bail Court, for the costs occasioned by these repeated notices; his Lordship however said he had no authority to grant such an application, but suggested that the better course was to move the Court against the attor-

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(a) This case came before the Court on a former day, see ante 44; on which occasion the present application was suggested.

(b) Vide *Hullock's* Law of Costs, 2d. ed. 485. 3 *Taunt.* 492. 2 *Burr.* 654. 4 *T. R.* 371. *Tidd.* 6th ed. 78. as to the liability of an attorney to pay costs to the opposite party for vexatious conduct.

ney for vexatious proceedings; and under that suggestion this application was now made.

BEST J. said he had some doubts whether the motion was tenable, but as he understood that his Brother *Holroyd* was favourable to it, he should grant a rule to shew cause.—And afterwards on shewing cause, the matter was ordered by the Court to be referred to the Master.

IN BAIL COURT.—WHEELER *v.* RANKIN.

Monday, Feb. 1st.

Though two notices are given by different attorneys of two different sets of bail, and bail put in by the sheriff have already justified, the defendant is entitled to have his bail justify and be allowed.

CHITTY moved to justify bail in behalf of the defendant. In this cause two notices had been given by two different attorneys, one on behalf of the defendant, and the other for the sheriff.

E. Lawes opposed the justification of the bail put in by the defendant, on account of the uncertainty occasioned by the two different notices, and on the ground that the bail put in by the sheriff had already this morning justified, and therefore the bail of the defendant could not be allowed to justify, for there could not be two allowances of bail.

BAYLEY J. There is no objection to the justification of these bail on that ground. In point of fact, it is no uncommon thing that notice of the justification of bail should be given by different persons. There are many different persons interested that bail should be put in—the defendant is interested, the bail to the sheriff are interested, and the sheriff himself is interested; and therefore it very often happens that you receive notice of bail from two different persons. If the defendant's bail were not allowed to justify, the consequence

1819.

WHEELER against RANKIN.

would be that the sheriff's bail might immediately render the defendant, notwithstanding he might be ready to perfect bail, and who would not render him. There must, however, be an affidavit that the bail were put in by the defendant, upon producing which, and the bail justifying, the rule for the allowance must be drawn up for such bail instead of the sheriff's bail. This was done accordingly during the sitting of the Court.

Monday, Feb. 1st.

SNELL'S BAIL.

A person once rejected as bail cannot afterwards become bail, however his circumstances may have changed.

IT was in this case objected that *Moore*, one of the bail, had been rejected before Lord ELLENBOROUGH on the 11th of *March* 1813, and in Court on the 20th of *May* in the same year; and which was established by production of the book in which the names of rejected bail are entered. And the facts were not disputed.

Campbell, in support of the bail, asked him under what circumstances he had been rejected. The bail said, he had been rejected six years ago on account of insufficiency of property, but that since then he had acquired much more than double the sum for which he proposed to become bail. But per.

BAYLEY J. If bail has been once rejected and entered in the rejected book, it is an established rule that the circumstances under which the rejection took place cannot on a subsequent occasion be inquired into, and the party afterwards continues incompetent to become bail.

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BUTLER'S BAIL.*

Monday, Feb. 1st.

Opposition of bail must be before justification, and a mistake of counsel in not opposing in time, will not be a ground for examination. (a)

COUNSEL was instructed to oppose this bail, but mistating the name when called over, did not oppose when they came to justify; but instantly after they had been sworn and had justified, the Counsel stated his mistake. But per

BAYLEY J. The rule is established, that opposition comes too late after the bail have justified, and it is not in my power to admit you to examine the bail.

(a) *Hawkins* v. *Wilson*, 5 *Taunt*. 666. If bail justify without the observation of counsel instructed to oppose them, the Court will not require them to come up again and justify *de novo*. *Per Curiam*. The bail may not like to come up again, nor can we ask a bail whether he has been guilty of perjury on a former day.

CONNELLY *v.* SMITH.

Monday, Feb. 1st.

The statute 10 G. 3. c. 50. takes away the privilege from arrest from servants of peers, though necessarily employed about their persons and estates, and therefore the Court refused to discharge defendant upon common bail who was employed as a surveyor on the estate of a peer. (a)

TURTON moved for a rule to shew cause why the bail bond in this case should not be delivered up to be cancelled, and why the defendant should not

(a) Before the passing of the 10 *Geo*. 3. c. 50. the servants of peers necessarily employed about their persons and estates could not be arrested. *Rivers* v. *Cousin*, 1 *Mod*. 146. In *Chester* v. *Upsdale*, 1 *Wils*. Rep. 278. the Court of K. B. refused to discharge a person on common bail who claimed his privilege as a gamekeeper in the service of Lord *Willoughby de Broke*, on the ground that it did not appear that the defendant was necessarily employed about his Lordship's estate; and the Court referred to the order of the House of Peers of the 28th *June* 1715, which they considered to be a declaration by the Lords themselves of the extent of their own privileges

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be discharged on filing common bail, upon an affidavit which stated that the defendant was a surveyor, and had been for a considerable time past employed in cutting a canal on the estate of Lord *Hawke*, a peer of parliament, and by virtue of such employment was entitled to privilege from arrest. It was well known that the House of Lords, on the first day of every session of parliament, issued an order in pursuance of the claim made in former times, for granting protection from arrest, not only to the members themselves, but to their menial servants and other persons necessarily employed about their persons and estates. The defendant in the present case, though not a menial servant, yet was necessarily and properly employed in the management of an estate of a peer in parliament, and upon that principle was entitled to his privilege. He was not aware of any case which decided that a person so situated was entitled to privilege from arrest; but as the affidavit stated positively that this person was necessarily and properly employed in the management of the property of Lord *Hawke*, the Court will consider him entitled to the benefit of the motion now made. It was true that the 10th *Geo.* 3. c. 50, had been passed for the purpose of limiting this privilege

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and as the defendant did not bring his case within the terms of that order, the Court refused to discharge him on motion, but gave no opinion whether he was entitled to the privilege he claimed. And see 2 *Stra.* 1065. The 10 *Geo.* 3. *c.* 50. *sec.* 1. enacts, that after the 24th day of *June* 1770, any persons may at any time commence and prosecute any action or suit in a court of record or court of equity or admiralty, and in all causes matrimonial and testamentary, in any court having cognizance of causes matrimonial and testamentary, against any peer or lord of Parliament of *Great Britain*, or members of the house of commons, or *against their or any of their menial or other servants*, or any other person entitled to the privilege of Parliament of *Great Britain*; and no such action, suit, or other process or proceeding, shall at any time be impeached, stayed, or delayed, under colour or pretence of privilege of Parliament. The second section of the act provides that it shall not extend to subject the persons of members of the house of commons for the time being to be arrested or imprisoned upon any such suit or proceedings. Vide *Tidd.* 6th ed. 199. *Imp.* K. B. 8th ed. 120.

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with respect to menial servants; but the Court would hardly construe that act to extend to a person in the situation of the defendant. It was however his duty to state, that in the second clause of that act no mention was made of the servants of members of parliament in protecting the members themselves from arrest. In the case of *Bartlett* v. *Hebbes* (a), this point was incidentally mentioned in argument, but the Court did not deliver its judgment upon it.

ABBOTT C. J. Though it was formerly held that the servants of peers necessarily employed about their persons and estates could not be arrested, yet this privilege has been taken away by the 10th *Geo.* 3. c. 50. I know of no case since that statute in which this privilege has been extended to the menial servants of peers of parliament, or to persons in the situation of this defendant; and therefore, unless some authority is cited, we cannot grant this application.

Rule refused.

(a) 5 *T. R.* 687.

FAIRMAN *v.* IVES.

Monday, Feb. 1st.

The plaintiff moved to set aside the special jury pannel, on the ground that twenty-six of the persons named therein were retail tradesmen, and therefore not entitled to the addition of esquire. Held that as the affidavit did not negative the qualification of the jurors excepted to, the Court could not interfere. (a)

IN this case, a rule for a special jury having been obtained, a pannel was struck in the usual course of business by the sheriff.

(a) The method of striking a special jury is for the sheriff to attend the Master with his book of freeholders, at the time appointed for that purpose by the Master, who is to give notice to the attorneys on both sides to be present, and the Master then makes out a list of forty-eight persons from the freeholders' book, out of whom each party is at liberty to strike out twelve,

1819. — Fairman *against* Ives.

The plaintiff now applied in person for a rule to shew cause why the special jury pannel so found should not be set aside and a new pannel struck, on the ground that the 48 persons named in the former were not properly entitled to the addition of *Esquire*. The affidavit upon which the motion was made stated, that the deponent had since the special jury were struck inquired into the condition and circumstances of the persons named in the pannel, and that out of the 48 therein described as *Esquires*, 26 were carrying on different trades as retail shopkeepers, or were engaged in other occupations which rendered them from their situation and habits of life wholly unfit to sit as special jurors and try the subject of the present action.

Abbott C. J. There does not seem to me to be any ground laid before the Court upon this affidavit to justify us in granting this application. The usual practice in striking special juries is for the sheriff to take the Freeholders' Book and select those persons against

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and the remaining twenty-four are summoned and returned by the sheriff. Bul Ni. Pri. 304, 5. *Rex v. Wooler, 1 B. & Ald. 193. Tidd, 6 ed. 838. Imp. K. B. 8th ed. 378. By rule of K. B. Trin. 8 W. 3. reg. 2. it is ordered that on a reference by the Court to the Secondary to return any jury, or to nominate forty-eight sufficient jurors (to try any issue here at the bar) in the presence of the attorneys of both parties, if the attorney of one side shall make default to appear before the said Secondary at the time by him appointed for the naming of the jurors aforesaid, or to strike out twelve of either part; in such case the said Secondary shall name the jury aforesaid in the absence of the attorney who shall make default thereupon, and shall strike out of the said forty-eight jurors twelve on behalf of either party, and the rest of the jurors shall be returned by the sheriff to try the issue. The practice as to striking special juries is nearly similar in criminal and in civil cases, and is authorized by the stat. 3 Geo. 2. c. 25. s. 15. passed in consequence of a doubt whether the Court could order a special jury to be struck without consent of the parties, unless the issue was to be tried at bar. The coroner in striking a special jury is not bound to take the pins as they occur in the sheriffs' books, but is to make a selection; and where he had made such selection impartially, the Court refused to cancel the list of the persons selected. *The King v. Wooler*, 1 B. & A. 193. See 1 *Chitty* on Crim. Law 523.

whose names the addition of Esquire is placed. The affidavit before the Court does not suggest that the persons chosen on the pannel are not duly qualified to sit as special jurors, nor does it complain of any improper motive on the part of the sheriff. All that is alleged in the affidavit is, that a certain number of the persons named in the pannel are engaged in trade, and therefore do not answer the description of Esquires. That suggestion is of itself no objection to the pannel, because it is very well known that there are many persons engaged in trade who are perfectly competent from their intelligence and education to serve upon special juries, and to whom from their property and substance the denomination of *Esquire* is given by courtesy. But even supposing this were an objection, there is nothing in this affidavit which negatives the qualification of the persons excepted to. The Court must deal with the motion upon the grounds stated in the affidavit, and they cannot go out of it. For any thing that appears at present to the Court, every one of the twenty-six persons mentioned may be possessed of sufficient freehold property, or may be otherwise qualified, so as to entitle them to assume the denomination of Esquire; and as no improper motive has been ascribed to the returning officer, it would be improper for the Court even to grant a rule to shew cause, for the affidavit upon which the motion is made would be a sufficient reason for discharging the rule with costs. It is much better, therefore, to refuse the rule in the first instance upon the affidavit, which certainly affords no ground for this application.

Per Curiam. Rule refused.

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Wednesday, Feb. 3d.

IN BAIL COURT.—COLMAN *against* ROBERTS.

Notice of bail must truly and accurately describe the persons intended to justify, so that the plaintiff may not be misled; and therefore where one of the bail was described as the housekeeper, and it turned out that his father was really the occupier, the Court would not permit him to justify, nor grant time to add and justify another, without an affidavit, repelling all intention to mislead. But upon afterwards producing such affidavit, time was given. (a)

ROBINSON applied for time to add and justify another bail in lieu of one whose name had been inserted in the notice given to the plaintiff's attorney. The application was made under the following circumstances:—The bail in question had been described as the housekeeper at the place referred to, but it turned out that the bail only carried on the business conducted on the premises, and that his father was really the housekeeper. The notice did not designate the bail by the appellation of *junior*, or in any other manner by which he could be distinguished from his father.

Reader said, that he was instructed to oppose the justification of the bail on the ground that he was not a housekeeper, which he submitted the defendant must have known before notice of justification was given. He urged, therefore, that this was not a case for any indulgence, because the defendant's notice was calculated to mislead the plaintiff, who, had no inquiries been made, might have had a person, not a housekeeper, given him as bail, supposing all the time that the father of the bail intended to justify.

HOLROYD J. I think this is not a case for indulgence, because it appears to me that the notice was

(a) On a justification by affidavit, bail have been rejected on the ground that one of them was described in the notice of justification as *James Mellon*, generally, when he styled himself in the affidavit of justification, *James Mellon* the younger. *Smith* v. *Mellon*, 5 *Taunt.* Rep. 854. 1 *Marsh.* Rep. 386. A misnomer in the recognizance and notice of bail, *e. g.* calling one of the bail Frances instead of Francis, is a ground of rejection. *Anon.* 1 *Moore* 126. C. P. *Wood* v. *Chadwick*, 2 *Taunt.* 173.

calculated to mislead. The notice should have described the person, who was intended to justify, in such a manner that he could not be mistaken for the father, for the plaintiff under the present notice would very naturally suppose that the father was meant. It appears a very suspicious case, and therefore I think it should take its course.

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COLMAN *against* ROBERTS.

Robinson pressed for leave to produce an affidavit in the course of the day, in order to acquit the defendant of any intention to mislead, by shewing that at the time the notice was given he verily believed that the son, and not the father, was the housekeeper.

HOLROYD J. You may have till the rising of the Court for that purpose; but your affidavit must not only shew that you did not know that he was not the housekeeper, but also account for your having described him as such in the notice of bail. This was accordingly done, and bail afterwards justified for the defendant.

IN BANK.—PATTERSON *against* EVANS.

Wednesday, Feb. 3d.

Defendant put off the trial, on terms that a witness going abroad should be examined on interrogatories. Held that plaintiff having detained the witness until the trial, after he had been examined on interrogatories, and cross-examined by defendant, was entitled to the costs of the detention, but that defendant was entitled to have his costs of the cross-examination interrogatories deducted.(a)

CHITTY on a former day obtained a rule calling on the plaintiff to shew cause why the Master should not review his taxation of costs in this case, under the

(a) Depositions taken by consent on a witness's going abroad are only taken *de bene esse*, and cannot be given in evidence if at the time of the trial the witness happens to be in this country, *Falconer* v. *Hanson*, 1 *Campb.* 172. *Anon.* 2 *Salk.* 691. 12 *Mod.* 493. *Bul.* Ni. Pri. 239. Where a fo-

1819.

PATTERSON *against* EVANS.

following circumstances stated in an affidavit:—The cause was appointed for trial at the sittings after last *Trinity* Term, and, on the motion of the defendant, it was put off until the sittings after *Michaelmas* Term, on the terms that the plaintiff and defendant should be at liberty respectively to examine a witness, then going abroad, upon interrogatories. The witness was accordingly so examined by both parties, by the 31st of *July*, and the expense attending the same, and keeping the witness until that time, amounted to 25*l.* on each side. Shortly after this, the plaintiff arrested the witness, and kept him in *England* until the 15th of *January* ult. when the cause came to trial, at which the witness was subpœned, and underwent a *viva voce* examination, and the plaintiff obtained a verdict. The expense of detaining the witness during this time amounted to 50*l.* and upwards. When the costs were referred to the Master for taxation, he allowed the whole of this sum, and did not allow the defendant any part of the expense he had incurred by the examination of the witness on interrogatories. Under these circumstances the present application was made, it being contended that the Master ought at least to allow the defendant's expense of examining the witness on interrogatories.

Campbell now shewed cause, and contended that the whole of the expense of examining the witness on interrogatories, and his subsequent detention, should be allowed as costs in the cause. The postponement of the trial from the sittings after *Trinity* Term until the sittings after *Michaelmas* Term, was matter of indulgence to the defendant, and it was reasonable that he should pay for that indulgence. If the defendant had

reigner is detained in this country for the purpose of giving his evidence upon a trial, the Courts will allow the costs of detaining him from the day of the writ sued out to the day of trial. *Sturdy* v. *Andrews*, 4 *Taunt.* 697.

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reason to complain of any extra expense it arose from his chusing to cross-examine the witness on interrogatories, which he need not have done, because he knew that the witness was still in *England*, and was likely to remain until the day of trial. It was hard therefore that the plaintiff should now be called upon to be 26*l.* out of pocket by the act of the defendant, whose own conduct had occasioned the expense of the interrogatories. Suppose the interrogatories had been taken only by the plaintiff, and the defendant had not put any, they could not have been read at the trial, because the witness was subpœned, and might be examined *viva voce*. The defendant need not have cross-examined on interrogatories, and therefore as his own conduct had occasioned such an examination, it was but fair that the expense should become costs in the cause.

Chitty in support of the rule urged, that after the examination of the witness on interrogatories, the plaintiff was not at liberty, except at his own expense, to detain him in England, though in case the witness was here accidentally he might have the benefit of his oral testimony on the trial.

ABBOTT C. J. I am of opinion that the plaintiff is entitled to the costs of keeping the witness here; (*a*) but in consequence of examining him on interrogatories, the defendant was induced to incur some expense in cross-examining him in the same manner, and that expense became fruitless by the subsequent detention of the witness. Therefore I think that expense ought to be deducted from the allowance made by the Master for maintaining the witness until the time of the trial. The defendant was obliged to attend the examination and cross-examination of the witness on interrogatories,

(*a*) See *Sturdy* v. *Andrews*, 4 *Taunt.* 697.

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and as that became unnecessary by the subsequent detention of the witness, it is fit he should be allowed the expense occasioned by the plaintiff's own act.

BAYLEY J. The plaintiff desired to be at liberty to examine the witness on interrogatories, and that was the term imposed, as an inducement to put off the trial. That threw upon the defendant the expectation that the plaintiff would be content with that examination, and under that expectation he incurs an expense in cross-examination. The plaintiff afterwards abandons his own proceeding, and therefore he ought to pay the costs to which the defendant has necessarily been put by that abandonment. If the plaintiff is to get the costs of keeping the witness here, it is but reasonable that he should pay the defendant the costs of examining the same witness on interrogatories. The question must therefore go back again to the Master.

HOLROYD J. and BEST J. concurred.

Rule absolute.

Wednesday, Feb. 3d.

LOWE *against* FARLEY.

Affidavit to hold to bail in an action by assignees, made by a clerk of the bankrupt, and stating that the defendant is indebted, "as appears by the bankrupt's books," is bad, if it do not state the deponent's belief that the debt is due. (a)

PULLER on a former day obtained a rule calling on the plaintiff to shew cause why the defendant should not be discharged on filing common bail, on the ground

(a) The general rule is, that there must be a positive affidavit. 1 *T. R.* 84. 8 *T. R.* 419, 420. and cases collected in *Tidd*, 6th ed. 185. But in actions at the suit of assignees and executors, &c. it is sufficient to swear that the defendant is indebted, as appears by the books of account of the bankrupt, &c. and as the deponent verily believes. *Sheldon* v. *Baker*, 1 *T. R.* 84. 2 *Stra.* 1219. *Etherington* v. ——, *M.* 45 *Geo.* 3. *Tidd*, 6th ed. 185. As to affidavit made by agent of the debt of principal resident abroad, see *Bland* v. *Drake*, post.

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LOWE *against* FARLEY.

of a defect in the affidavit of debt. The action was brought by the assignees of a bankrupt, and the affidavit to hold to bail was made by a clerk of the bankrupt, which stated, "that the defendant is justly and truly indebted to the assignees for so much money had and received by the defendant, to and for the use of the assignees, as appears by the books of the said bankrupt;" but it did not go on to add "which he verily believes to be true."

Comyn appeared to shew cause; but

The COURT held the affidavit defective, for the above-mentioned omission, and therefore made the

Rule absolute.

MORRIS *v.* HUNT.

Wednesday, Feb. 3d.

A Judge's summons returnable before judgment is signed operates as a stay of proceedings. Therefore where the time to plead was not out until the 18th of *January*, and the defendant took out a summons for further time, returnable at 11 in the morning, and the plaintiff signed judgment at 3 o'clock in the afternoon of the same day, *Held* that the judgment was irregular. An affidavit of merits must shew that the deponent making it is the defendant, or his attorney or agent. (*a*)

PRINCEP on a former day obtained a rule, calling on the plaintiff to shew cause why the judgment signed in this case should not be set aside for irregularity.

The action was brought by the high bailiff of *Westminster* against the defendant, as one of the candidates

(*a*) In *Redford* v. *Edie*, 6 *Taunt.* Rep. 240. time had been given to justify bail before a Judge at chambers till the 15th of *May*. On the 12th of *May* a summons for further time to justify was taken out, returnable on the 13th, and the plaintiff's attorney not then attending, it was twice renewed; and during the pendency of the last summons, namely, on the 17th of *May*, the plaintiff took an assignment of the bail bond, and on the 18th sued out writs against the bail;—and the Court set aside the proceedings, on the ground that the summons for further time being returnable before the original time had expired, operated as a stay of proceedings.

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MORRIS *against* HUNT.

at the last general election for the city and liberties of *Westminster*, to recover his share of the expense of erecting hustings, paying poll clerks, &c. under the 53d *Geo.* 3. c. 152. "An act to continue, until the 1st day of *January* 1819, an act made in the 51st year of his present Majesty, to explain and amend the laws touching the elections of Knights of the Shire to serve in Parliament for *England*, respecting the expences of Hustings and Poll Clerks, so far as regards the City of *Westminster*." On the 21st *November* the declaration was served upon the defendant, with notice to plead in eight days, but at the request of the latter, six weeks further time was given for that purpose. Before the expiration of this time, the defendant desired a better particular than had already been delivered of the plaintiff's demand, and at the same time obtained ten days further time to plead, which expired on *Sunday* the 17th day of *January*. A better particular had been sent to the defendant on the 7th of *January*, but it did not actually reach him until the 17th. On *Monday* the 18th of *January*, the defendant's agent being dissatisfied with the particular delivered, took out a summons for further time to plead, in order that a better particular might be given; but this summons was not attended to, it being returnable at eleven o'clock in the morning of that day. On the morning of the 19th, the plaintiff's attorneys were served with a second summons, which they also neglected to attend; but on a third being served, they attended the Judge at chambers, and then it was stated that judgment had been signed at three o'clock in the afternoon of the 18th of *January*, as for want of a plea, it being contended that the judgment so signed was regular. Under these circumstances, the learned Judge refused to hear the fresh summons, and the judgment remaining in force, the defendant applied by counsel on the first day of this term to set it aside for irregularity.

Scarlett and *Smedley* now shewed cause against the rule, and contended that the judgment was regularly signed in the afternoon of the 18th of *January*, the time for pleading having on that day expired, and therefore that the Court could not stay the proceedings. There was nothing in this case to shew that the defendant was taken by surprise. Every indulgence had been shewn him in extending the time to plead, without putting him to the expense of an order for that purpose; and the plaintiff had done every thing in his power to give him a full particular of his demand. If the defendant was dissatisfied with the last particular given, he ought to have taken out a summons earlier than the 18th of *January*, the day when the time for pleading had expired. It was not the plaintiff's fault if the last-mentioned particular did not reach the defendant until the 17th, because it had in fact been sent to him on the 7th of *January*, as was sworn in the affidavit. The judgment having been regularly signed on the 18th, the Court could not relieve the defendant, even though it must be admitted that the defendant's first summons was returnable before the judgment was signed. They referred to *Calze* v. *Lord Lyttleton, Executor* (*a*) as an authority. There the rule to plead was out on *Monday* the 6th of *June*. On that night the defendant's attorney took out a judge's summons, to shew cause the next evening at six, why the defendant should not have time to plead. At the opening of the office on *Tuesday* afternoon, the plaintiff signed judgment, and afterwards attended *Nares J.* at seven, who, finding that judgment was signed, refused to do any thing in the matter, but referred the parties to the Court; and the Court, on being applied to, said, " This judgment is regularly signed. By the rule of 13 *Geo.* 2. a Judge's summons is held to be no proceeding. It stays nothing; and has no effect unless it be returnable before the party has a

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(*a*) 2 Sir *Wm. Bl.* 954.

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right to sign his judgment. Here the plaintiff had a right to sign judgment at the opening of the office at five in the afternoon, and the summons is not returnable till six."

The Defendant, in person, was now heard in support of his rule, and urged that he had used all due diligence in taking out a Judge's summons. It was sworn, that although the plaintiff's amended particular was sent on the 7th of *January*, yet in point of fact it did not reach him until *Sunday* the 17th, when nothing could be done. It was true, that the time to plead was up on the 17th, but that being *Sunday*, he had all day of the 18th to plead; and early on the morning of that day he had taken out a fresh summons, which was returnable only at eleven in the morning; and the plaintiff having neglected to attend it, signed judgment at three o'clock the same afternoon, which was clearly irregular, even according to the authority cited by the plaintiff's counsel, where it was held, that if the Judge's summons is returnable before judgment can be regularly signed, it is a sufficient ground for setting aside the judgment.

ABBOTT C. J. It appears in this case that the summons was returnable at eleven o'clock in the morning, and that the judgment was not signed until many hours afterwards. The first and second summonses were not attended to, and there is no appearance to the third until after judgment is signed. It seems to me, that the summons being returnable before the plaintiff had a right to sign judgment, the plaintiff is irregular. He must have used the greatest expedition in getting his judgment signed so soon. Under these circumstances, I am of opinion that the judgment was irregular, and that the rule for setting it aside must be made absolute.

BAYLEY J. I have always considered the practice of this Court to be, (and if I am wrong the Master will correct me) that if the Judge's summons is returnable

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before the judgment is signed, it prevents the plaintiff from signing judgment. If the plaintiff in this case signed judgment before the return of the summons, it operates as a stay of proceedings. It strikes me, that the summons being returnable before the judgment was signed, the plaintiff ought not to have signed it. Had he attended the Judge at the return of the summons, the matter might have been discussed, and the Judge would have determined whether there was any ground for granting further time: but not having availed himself of that opportunity, I think he has been premature. Unless there is a decided authority for governing the practice in this case, I think upon principle, and according to the dictates of common sense, the plaintiff has been irregular. I agree that where the summons is taken out returnable after the time to plead is out, it ought not to stay the proceedings, unless the plaintiff has had an opportunity of attending it. But here the case is otherwise; and the authority cited from Sir *William Blackstone's* Reports is strongly in favour of this application; for there the plaintiff had a right to sign judgment at five in the evening, and the summons was not returnable until six.

HOLROYD J. and BEST J. concurred, and therefore the rule was made

Absolute.

Affidavit of merits must appear to have been made by the defendant, or his attorney or agent.

Note.—It appeared that in the affidavit in support of the motion, (which was made by *William Bryant*) the deponent swore to merits, without describing himself either as the defendant's *agent* or *attorney*; and

The COURT said, that it was not competent for a third person to swear to merits without describing himself as the attorney or agent for the litigating party; and therefore that part of the affidavit on the part of the defendant could not be received.

1819.

Wednesday, Feb. 3d.

Where a party was agent of vender and vendee in the sale and purchase of an estate, and afterwards became the sole agent of the vendee, to whom an abstract of the title deeds was delivered, but who afterwards refused to complete his purchase, and retained the abstract in his hands, the Court compelled the defendant and his agent to deliver it up to the plaintiff, after action brought to recover the purchase money of the estate. (a)

LANGSLOW AND ANOTHER *against* COX.

MANNING on a former day obtained a rule calling on the defendant and *William Lambert White* to shew cause why the latter should not deliver to the plaintiffs the abstract of the plaintiffs' title to the life estate of *Francis Newman* in lands in the county of *Somerset*, which had been delivered by the plaintiffs to Mr. *White*, as attorney or agent for the defendant.

Rogers and *Chitty* now shewed cause, and contended that the defendant was not bound to comply with the terms of this rule. The action was brought against the defendant to recover the purchase money of an estate which he had purchased according to the terms of an advertisement published respecting the property. The abstract of the plaintiffs' title had been delivered to the defendant in order to satisfy him of the sufficiency of the security. Having refused to complete the purchase upon certain objections to the title, the plaintiffs brought the present action. Under such circumstances the defendant had clearly a right to keep the abstract, as he was the remainder man after the death of the tenant for life, and during the pendency of this action it was necessary that he should have the abstract, in order that he might be enabled to frame his plea to the declara-

(a) As to the cases where the Court will compel a defendant to give plaintiff inspection and copy of an instrument to enable him to declare on it, see *Tidd* 6th ed. 619. and 505. and cases there referred to; but see 6 *Taunt.* 302. 283. The Court will interfere in a summary manner at the instance of the lord of a manor to compel an attorney who holds the office of steward to deliver up to the lord the court rolls and other deeds relating to the manor. Ex parte *Grubb*, 5 *Taunt.* Rep. 206. C. P. See *Hughes* v. *Moyre*, 3 *T. R.* 275. *Cocks* v. *Harman*, 6 *East.* 404. 8 *East.* 237. Ex parte *Corpus Christi College*, 6 *Taunt.* 105. *Duncan* v. *Richmond*, 7 *Taunt.* 391.

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tion, which last had been delivered before this application was made, and therefore the plaintiffs could not want the papers. Besides, a purchaser has a right to retain the abstract which he has received from the vendor until the contract has been wholly rescinded.(*a*)

Manning, in support of his rule, suggested, that Mr. *White*, the person named in the rule, was originally agent for both parties, and now he had become agent for the defendant only; and therefore, as he had originally received the papers from the plaintiffs by virtue of his joint agency, he had no right to retain them in his possession now that he had become agent for the defendant only.

ABBOTT C. J. Is there any instance of a party being allowed to retain papers such as these in his hands under the circumstances stated? These papers came originally from the plaintiffs' hands to a person who was then considered as the agent of both parties, but who has now become the agent of the defendant only. Ought they not to be returned to the hands from whence they came? If the defendant has any right to them, let him bring an action to recover them. The plaintiffs have a right to call for the abstract, in order that they may settle their declaration. But it is said, that they have already delivered their declaration, setting out numerous deeds, and therefore they don't want them. Has it never been known that a declaration was delivered in order to save time and prevent a trial being lost, but which it may afterwards be very material to amend when better instructions have been obtained?

BAYLEY J. If the purchaser of an estate refuses to

(*a*) *Roberts* v. *Wyat*, 2 *Taunton* 268.

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complete the contract, and pays nothing, he has no right to keep the abstract.

Rule absolute.

Thursday, Feb. 4th.

IN BAIL COURT.—JAMESON'S BAIL.

Affidavit of service of notice of bail, by leaving it and stating acknowledgement of receipt of it, but not shewing by whom, not sufficient, but bail allowed to justify conditionally.

PLATT moved to justify bail, and shewed that the affidavit of the service of notice of justification stated the serving of the notice at the office of the plaintiff's attorney, "by putting and leaving it in his letter-box; and this deponent verily believes that the plaintiff's attorney hath received the notice of justification, he this deponent having been informed at the said attorney's office (but not saying by whom) that such notice had been received."

HOLROYD J. The bail may justify, but the rule for allowance must not be drawn up until a positive affidavit of the admission of the receipt of the notice by some authorized clerk of the plaintiff's attorney has been introduced.

Thursday, Feb. 4th.

DOE, *on the Demise of* HALSEY, *against* ROE.

Service of a declaration in ejectment, by leaving it with a servant of the tenant in possession, bad, for want of an acknowledgment that the tenant had received it. (*a*)

F. POLLOCK moved for judgment against the casual ejector as to one tenant in possession, the service of the declaration being regular; and for a rule

(*a*) When after fruitless attempts to serve the tenant, his servant admitted that he was at home but refused to admit the deponent unless he sent in his name, and the deponent then delivered the declaration to the servant, the Court of Exchequer granted a rule that the service should be deemed good. *Doe* v. *Roe*, 2 *Price* 112. Where the tenant keeps out of the way to avoid

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to shew cause why the service on the other should not be deemed good service, on an affidavit which stated "That deponent served the declaration upon the other tenant in possession, by leaving it with a servant of the said *Susannah Ewers* upon the premises," &c. But the affidavit did not go on to state that the tenant had acknowledged receiving the declaration, but merely stated that the deponent believed that such tenant had received it.

The COURT held this service insufficient, and that without an affidavit of an acknowledgment by the tenant that he had received the declaration, the rule must be

Refused.

being served, it will be sufficient to deliver a copy of the declaration to one of his family, or if there be no one in possession, may be affixed on some conspicuous part of the premises. *Adams* on Ejectment, 2 ed. 210. *Tidd.* 5th ed. 509, 510. In such a case, on the motion for judgment against the casual ejector, the affidavit should state the *deponent's belief* that the tenant kept out of the way to avoid being served. 6 Nov. M. *T.* 59 *Geo.* 3.

Ex. parte RICHARDS.

Thursday, Feb. 4th.

Attorney readmitted without fine or payment of arrears, on an affidavit that for two years he had been prevented practising, from illness. (*a*)

CHITTY moved, that this gentleman might be readmitted as an attorney of the Court, *without fine*, and *without paying any arrears of duty*, on an affidavit,

(*a*) See 37 *Geo.* 3. c. 90. s. 31. The admission of an attorney who has omitted to take out his certificate for one whole year after his admission is absolutely void by the provisions of this statute, and he must be readmitted before he can practise. Where a gentleman had been admitted an attorney, but had never practised for himself nor taken out his certificate, but had for some time acted as an assistant to another attorney, and was afterwards obliged by illness to discontinue the profession altogether, the Court readmitted him on payment of 6*s.* 8*d.* fine, and on his taking out his certificate and paying the duty from the time of the application. Ex-parte *Nicholas*, 6 *Taunt.* 408.

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stating that for two years last past he had been wholly prevented from practising by reason of illness. As the practice was doubtful whether an attorney could be admitted, under such circumstances, without fine and without payment of arrears of duty, he wished to take the judgment of the Courts, as to the terms upon which this gentleman should be readmitted.

Bayley J. after inquiring of the Master, and looking into the statutes, said, that an attorney might be readmitted without payment of any fine or arrears under the circumstances stated.

Master Le Blanc said, that a Mr. *Clarke* had been so readmitted this term.

Rule granted in the following terms: (a)

(a) Ex parte *Richards*, gent. Upon reading the affidavit of *J. R.* gent. It is ordered, that the said *John Richards* be readmitted an attorney of this Court without the payment of arrears of duty and fine, but for the present year, upon the motion of Mr. ——— By the Court.—Ex parte *Clarke*, *Marryat* obtained a rule directing that Mr. *Clarke* should be readmitted upon payment of the duty and taking out his certificate for the present year, and without payment of the arrears. The following is the form of the affidavit upon the rule ex parte *Clarke's* was granted:—"In the King's Bench. *Thomas Clarke*, of *Warwick*-street in the parish of *St. James's*, *Westminster*, in the county of *Middlesex*, gent. maketh oath and saith, that the duty of 100*l.* imposed upon articles of clerkship, was paid on certain articles bearing date the 10th day of *February* 1794, and made between *Carey Bayly*, of New Inn in the said county of *Middlesex*, gent. then one of the attornies of this honourable Court, (since deceased) of the one part; and *Thomas Clarke* the elder, of Great *Ormond*-street in the parish of *St. George the Martyr*, in the said county of *Middlesex*, baker, (since also deceased) and his son, this deponent, of the other part; and that he this deponent was duly admitted an attorney of this honourable Court in or about *Michaelmas* Term in the year 1801, and hath obtained three annual certificates, authorizing him this deponent to practise during the years 1801, 1802, and 1803. And this deponent further saith, that he hath ceased to renew the last of such annual certificates from the expiration thereof on the 1st day of *November* 1804, on account of his having from the same first day of *November*, until the month of *June* last, been employed by respectable attornies of this honourable Court and the Court of Common Pleas, and solicitors in Chancery, as their clerk; and having been thereby prevented from practising for his this deponent's own advantage, and not

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from any desire to defraud his Majesty's revenue, nor on account of any threat, fear, or apprehension of any application or motion being made to this Court against him this deponent. And this deponent saith, he hath not incurred any penalty or penalties whatever by practising as an attorney in his own or any other person's name. And this deponent further saith, that from the said 1st day of *November* 1804, the time of the expiration of the last certificate obtained by this deponent as aforesaid, down to the present time, he hath actually abstained from practising as an attorney for his own benefit and profit; and hath from the said 1st day of *November* 1804, until the month of *June* last, been employed solely as clerk to respectable attornies of the Court of King's Bench and Common Pleas, and solicitors in Chancery, and for their sole benefit and profit. And that he this deponent hath not been at any time employed, concerned, or engaged, either as principal or otherwise, in any other profession or business. And this deponent likewise saith, that he this deponent did, previous to the 1st day of *Michaelmas* Term last, serve the solicitor for the commissioners of his Majesty's stamp duties with a notice in writing, containing the name and place of abode of this deponent, and the name and late place of abode of the said *Carey Bayly* deceased, and purporting that he this deponent intended to apply as at the then next *Hilary* term to be readmitted an attorney of this honourable Court, on payment of a penalty of 20*s*. and taking out a certificate for the year 1819, by delivering to and leaving with a clerk of the said last mentioned solicitor, at the Stamp Office in Somerset House, a true copy of uch notice. And this deponent also saith, that he this deponent did, previous to the said 1st day of *Michaelmas* Term last, affix upon the outside of the Court of King's Bench at *Westminster* Hall, and in the King's Bench office, in such places as public notices are usually affixed, and also did enter in the books kept for that purpose at the chambers of each of the Judges of this honourable Court, notices in writing, purporting that this deponent intended to apply as at the then next *Hilary* Term to be readmitted an attorney of this honourable Court; and which said notices did contain the name and place of abode of this deponent, and the name and late place of abode of the said *Carey Bayly* deceased; and to the best of this deponent's knowledge and belief such notices remained and continued so affixed and entered during the whole of *Michaelmas* Term last.

Thomas Clarke."

" Sworn in Court this 23d day of
January 1819. By the Court."

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Friday, Feb. 5th.

Ricketts *against* Salwey.

In an action on the case for disturbance of common, where the right is alleged to be in respect of *a messuage and land*, it is not necessary for the plaintiff to prove the *whole* of such allegation; and where the plaintiff declared upon a right of common in respect of a messuage and one hundred and fifty acres of land, with the appurtenances; *Held* that the declaration was divisible, and that proof of common right in respect of the land was enough to entitle him to a verdict *pro tanto.* (a)

ACTION on the case for the disturbance of the plaintiff's right of common by digging stone, gravel, &c. tried before *Garrow* B. at the last assizes for the county of *Salop*. The plaintiff declared upon the possession of a messuage and land, and as being entitled to common of pasture in respect thereof; he proved his right in respect to the land, but did not sufficiently prove it in respect to his messuage. The defendant called no witnesses, and the plaintiff obtained a verdict with nominal damages, the learned Judge giving the defendant leave to move to set aside that verdict and enter a nonsuit, if the Court should be of opinion that a nonsuit ought to be entered, on the ground that in this action, which was against a wrong doer for disturbance of right of common, it was necessary for the plaintiff to prove a right of common in respect to both messuage and lands. In *Michaelmas* Term last, *Taunton* obtained a rule nisi; and

Puller and *Winter* (with whom was *Jervis*) now shewed cause. The declaration in this case avers, "that whereas the plaintiff at the time of committing the grievances hereinafter mentioned was and still is lawfully possessed of a certain messuage and divers, to

(a) Plaintiff may recover in trover, or other action for tort, as sole owner of the property, although it appear in evidence that he was only joint-tenant or tenant in common with others, and the omission can only be pleaded in abatement. *Bloxam* v. *Hubbard*, 5 *East* 420. *Sedgworth* v. *Overend*, 7 *T. R.* 279. *Addison* v. *Overend*, 6 *T. R.* 766. 1 *Saund.* 4th ed. 291 h. notes by Serjt. *Williams*. In an action for disturbing common, plaintiff must prove a right to same kind of common as that alleged, but need not prove the *same title* as is set out in the declaration, for the disturbance is the gist of the action, and the title only inducement. *Bul.* Ni. Pri. 76. 1 *Saund.* 346. n. 2.

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wit, 150 acres of land with the appurtenances, situate and being in the parish of *Ashton Bowdler*," &c. The simple question in this case is, whether in this action, which is against a wrong doer, it was necessary for the plaintiff to prove a right of common in respect to both messuage and lands, in order to entitle him to damages for the injury he had sustained. In the first place, the declaration in this case is divisible, and upon the general principle, recognized in a variety of cases, that if the plaintiff only proves part of what he alleges, he is entitled to a verdict, and is not necessarily tied up to prove the whole. The plaintiff in his declaration may allege more or less, and if he sustains his title only to a part of what he alleges, the jury may apportion damages either to the whole or to a part, according as the alleged injury is proved. In cases of this description the title of the plaintiff is merely the inducement to the action, and the title is an immaterial averment. This is not like the case of a contract, because, as the contract is the basis of the action, if it is set out in the declaration, it must be literally proved; but in this case the jury are only to look to the damage which the plaintiff has sustained, because this is an action against a wrong doer, and therefore the defendant has no right to question the plaintiff's title to the soil, his business being to answer the wrong alleged to be done by him. This action is grounded upon the possession, and therefore the title would only be matter of inducement. The plaintiff need not set out any title whatsoever, because as to the defendant, who did the injury, it stands indifferent whether the plaintiff is owner of the soil or not. If then the declaration in this case be divisible, and the plaintiff shews that the defendant has injured the right of common which is claimed in respect of the land, but fails as to the message, still the jury must apportion the damage sustained in respect of the former. It was upon this principle that the jury found their verdict

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below, and that principle is founded upon a variety of authorities. He cited in support of his argument *Eardley* v. *Turnock*, (a) *Bertie* v. *Beaumont*, (b) *Strode* v. *Byrt*, (c) *St. John* v. *Moody*, (d) *Fowles* v. *Miller*, (e) *Ferrer* v. *Johnson*, (f) and *Wynn* v. *White*, (g). On the authority of these cases he contended that the declaration being divisible, and the title being mere matter of inducement, the plaintiff was entitled to recover damages *pro tanto* for the injury he had sustained in his right of common appurtenant to the 150 acres of land.

W. E. Taunton and *Campbell* contra. The objection to the plaintiff's right to recover in this action is, that the declaration is not divisible. The declaration might have been framed otherwise, but here the messuage and the land are described as one entire tenement. If the allegation had been "that the plaintiff had been possessed of a messuage and divers, to wit, 150 acres of land belonging thereto, and occupied therewith," there would be words connecting the land with the messuage, and under such a declaration he might recover the damages claimed in respect of the right of common so appurtenant to the entirety. But there are no such words of connexion here, for the declaration alleges the right of common with reference to both messuage and land, shewing thereby an entirety of right. The right might have been alleged differently, but as it is at present set forth it is incapable of severance. The declaration avers, "That whereas the plaintiff, at the time of committing the grievances hereinafter mentioned, was and still is lawfully possessed of a certain messuage and divers, to wit, 150 acres of land with the appurtenances, situate and being in the parish of *Ashton*

(a) Cro. Jac. 629. Palmer 270. (b) 16 East. 33. (c) 4 Mod. 418. (d) 1 Vent 275. (e) 3 Taunt. 137. (f) Cro. Eliz. 335. (g) 2 Sir W. Bl. 840.

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Bowdler," &c. It then goes on in this way, "and by reason thereof"—by reason of what? why of the possession of *two* things which are put together; for it says "a messuage and so many acres of land, and by reason thereof, during all the time aforesaid ought to have, and still of right ought to have common of pasture for all his commonable sheep, *levant* and *couchant*, in and upon the said messuage and lands with the appurtenances." It does not say "in and upon the said messuage and land respectively," but "in and upon the said messuage and land with the appurtenances belonging thereunto," clearly describing one entire tenement. The terms "with the appurtenances" following the enumeration of "the messuage and land," import one entire tenement. It is not usual in speaking of land in conveyances to say "land with the appurtenances." It is otherwise of a messuage, and it is a very common description to say "messuage with the appurtenances." It may be very often found, perhaps, as connected with land; but certainly, in conveyances generally, penury of language is seldom urged as an objection. Common may undoubtedly be appurtenant to land. Had the declaration been in this case framed in the way suggested, the objection might not be available, but here the plaintiff declares in respect of one entire estate. Quantity certainly does enter into the consideration here—quality being the important question between the parties. The answer given to the objection at the trial is of a different nature from that suggested to-day, and therefore the defendant is in a manner taken by surprise, as he did not expect to be called upon to meet the argument now made as to the form of the action. (*Abbott C. J.* If you were taken by surprise, that might be a ground for an application of a different kind. The question now before us is, whether the evidence supported enough of the declaration to enable the plaintiff to sustain the action.) The

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learned Counsel then endeavoured to distinguish the cases cited on the other side from the present; and he contended that the title in this case was as much the basis of the action as the contract would be in assumpsit: the plaintiff had no right to complain of what the defendant did on the common and waste land, unless he had a right of common. His right therefore was the basis of the action, and was consequently the most material part of this case. The right here was not mere matter of inducement, because it must be proved. The plaintiff was bound to prove title to some right of common, and unless he did so his action was altogether without cause; for he had no right to complain of that which in the abstract might be an injury to the common, unless he proved that it was an injury to his right of common. The question undoubtedly was in this case whether the allegation in the declaration was divisible or not. If not divisible, and therefore applicable to one entire tenement, then the plaintiff could not recover damage in respect of a part of the whole.

Abbott C. J. I have always considered it to be the general rule of pleading, that in an action for a wrong done, if the party proves part only of the declaration, the part proved is sufficient to entitle him to maintain an action; and that he is also entitled to maintain his action, although the defendant is entitled to a part of the subject-matter of the injury. That I consider to be the general rule in pleading in actions of tort. Undoubtedly it is liable to exception, as, for instance, where the allegation is matter of description. There it may sometimes happen that if the whole description be not proved, and you do not prove the thing as you have alleged it, but prove something differing from it, you fail in the action. Though you prove part in such cases, you cannot succeed unless you prove the

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whole. The question in this case (and that is the only difficulty I have felt throughout the whole argument) is, whether this is to be considered as matter of *description*. The words are, " possessed of a certain messuage, and divers, to wit, 150 acres of land with the appurtenances," without shewing that they were occupied together, or in any way connecting the land and the messuage together, so as to make the whole descriptive of one entire tenement. If there had been such words of connexion, so as to make the language of the declaration descriptive of the thing itself, I should be of opinion, in this case, that the description should be fully proved. But I consider that these are not words of description. It is an allegation that the plaintiff is possessed of a house, in respect of which he has a right of common; and that he is also possessed of land, in respect of which likewise he has a right of common. Having proved that he is possessed of land in respect of which he has a right of common, he is entitled to that right, although he has not proved it in respect to the messuage. Under such circumstances, he is entitled to have a verdict entered for so much in respect of that right of common as has been injured by the defendant. If this decision is wrong, the defendant may avail himself of it in error.

BAYLEY J. I think this is not an entire, but a divisible allegation, and the nature of the action is such, that if the plaintiff proves so much of his declaration as shews that he is injured, it is sufficient to entitle him to a verdict. The allegation is, " That he is posssessed of a messuage and divers, to wit, 150 acres of land, and that he is entitled to right of common by reason of that possession, as appurtenant to the said messuage, and also in respect of the said land." That, I think, in legal effect and meaning is, that he has a right of common either in respect to the whole, or in

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respect to some part of that property, and I think that he is not bound to prove that he has it in respect to the whole. One way of putting the case occurred to me, while the argument was going on, which will make that intelligible, although it is a different mode of putting the same point. Suppose it turned out in the evidence that originally there had been a right of common in respect of a messuage, and in respect of 150 acres of land,—that would have been the plaintiff's *primâ faciæ* case; and supposing he had proved it, would it be an answer to that case, to shew on the part of the defendant, that in respect of the messuage, or a small part of the land, the right had been extinguished, but remained in the residue? I think that is only putting the same point in a different light; but I think, by putting it in that light, it has a tendency to shew that the opinion which the Court have formed on this subject is a right opinion. If this is a divisible allegation, the plaintiff is clearly injured, as has been proved, and he is entitled to a verdict to the extent of that injury. He proved the right of common with reference to one part of that which is included in the messuage and the 150 acres of land. It is suggested in argument, that under this declaration the plaintiff might be proving that he had a right, in respect of five acres of land in one place, five in another, and five in a third. I take it that this declaration would not let the plaintiff into that sort of proof, because he only claims *one* right of common, and he cannot be at liberty under this declaration to give evidence of distinct rights of common in respect of unconnected quantities of land. The case of *Eardley* v. *Turnock* (a) seems to me to be a very strong authority to shew that the opinion which the Court is now adopting is the right one. The declaration in that

(a) Cro. Jac. 629.

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case stated "That *Eardley* was seised in fee of a messuage and sixty acres of land, sixty acres of meadow, and eighty acres of pasture in *Heyton*, and that he and all his ancestors had had common appurtenant in 200 acres of waste, and that the defendant had inclosed three acres thereof, and disturbed him of his common, to the plaintiff's damage of 40*l.*; he therefore claimed his right of common in respect of sixty acres of land, sixty acres of meadow, and eighty acres of pasture. What is the verdict? "That he is entitled to it in respect of the messuage and ninety acres of land, meadow, and pasture thereto appertaining, and for the residue that he had not common." Why then, unless this had been considered as a divisible allegation, the plaintiff would have failed as to proof of the subject-matter of his claim. The only way in which the present case is distinguishable from that is, that there the plaintiff failed as to the *quantity*, but that here he fails as to the *quality*, that is, as to some part of his property. But if you are not bound to prove the whole in *quantity*, why are you to prove the whole in *quality*? The reason why he is not bound to prove the whole is this: "The common is but the inducement to the action, and the substance is the inclosure, which occasioned the *tort*; and if he had common to more or less land, it had not been material in this action, or upon this issue." Therefore I think that is an authority for the purpose of shewing that if you shew a right of common to one thing, which the general allegation comprehends, that is sufficient to entitle the plaintiff to a verdict.

HOLROYD J. I am of the same opinion, that in this case the allegation is sufficiently proved to entitle the plaintiff to recover in the present action for such part as he has proved. In considering questions of variance, I have always looked to this maxim of the law, that a plaintiff must recover *secundum allegata et pro-*

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bata; you must not allege one ground of action, and recover upon a different ground; but your proof must agree with the ground of action you have alleged. If, however, you prove a distinct ground of action, and that which you allege is only proved in part, that is sufficient to sustain an action. Therefore, if you allege a ground of action which is not fully sustained in evidence, but you prove that there is some ground of action *pro tanto*, having so proved it, the Court will give that judgment to the party to which he is entitled so far as his proof goes. This principle applies to *torts*. In the case of a contract, where the contract is alleged as containing several different particulars, and all the particulars alleged are not proved, the law has said, that that is a different contract; and if you give proof of that which the law says is a different contract, it is endeavouring to establish a different ground of action from that alleged in the declaration, and the party cannot recover, because he does not prove the ground of action, and because he proves a different contract from that declared upon. The same principle applies in the case of a prescription, when you plead in bar to an action. Prescription is an entire thing, and when it is alleged and issue is taken upon it, it must be proved as alleged, for otherwise it is a different prescription. The universal principle where prescriptions are alleged, and particularly in pleas in bar, is, that if you do not prove the prescription to the full extent alleged, you cannot recover upon such an issue. (*a*) In the present case the declaration does not allege any prescription at all, but states that the party is possessed of a messuage and lands, and by reason thereof he is entitled to certain common right. Where the party declares by prescrip-

(*a*) *Bul.* Ni. Pri. 299. cites 2 *Rol. Abr.* 706. *Rogers* v. *Allen*, 1 *Campb.* 313. *Brook* v. *Willett*, 2 *Hen. Bla.* 224. *Rex* v. *Surry*, 2 *Campb.* 455. *Rex* v. *Buckingham*, 4 *Campb.* 189.

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tion, by writing, or by agreement *non constat*, that the allegation in the declaration is made out by merely proving part of the title, because the proof in such case is different from the ground of action alleged, and proves a different right of common. In this case it is said that the plaintiff was possessed of a messuage, and that in respect thereof he had certain right of common; whereas that allegation is not proved, but the evidence which he offers does not prove a different allegation, because it is referable to another right in respect of which he declares. The only difference is, that he has not proved to the full amount of his claim, but only to a part. He has proved that he was possessed of land to which common right was annexed, but he has offered no proof with respect to the messuage. The proof therefore he has given, sustains his allegation in part, and therefore he ought to have a right of common in respect of that part which he has proved. He proves in respect to the land but not in respect to the messuage, but that is not proof of a different allegation, but proof of the same allegation in part. It appears to me that this part of the same allegation is not to be considered as an allegation of one entire thing, as in the case of a prescription, but as that which is divisible. If the disturbance of common is proved in the way alleged, that is to say, is proved to be a disturbance of the same nature and kind as that alleged, but not to the whole extent of the allegation, then the plaintiff is entitled in respect to that which he has proved. If he proves that he is entitled in respect of the 150 acres of land, that is sufficient to entitle him to a verdict. It is not necessary to prove the allegation to the whole extent. Upon what principle can it be said, that if it is not necessary to prove the right with respect to all the premises that the declaration alleges—you cannot recover in part? What difference does it make when the premises, in respect of which it is not proved, is different entirely

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from that proved? The defendant says, that as you have only proved as to part, you are entitled to recover nothing, because the allegation is not proved in respect to all the premises. Now it appears that the plaintiff has distinctly proved his right to recover in respect of the land, and I really do not see on what principle it can be said, that he cannot recover to that extent because he is not able to prove as to the rest. I have always understood that if you prove part of what you have alleged, that is sufficient to enable you to maintain an action for what you have proved, and that in such case you are entitled to recover to that extent. In the case of a misdescription there you cannot recover, because you don't prove the thing as alleged, and because proof of part is a different thing from the whole, which you are bound to make out. I think, therefore, that this rule must be made absolute.

BEST J. In the case of a contract the contract is the basis of the action, therefore it must be proved as stated. So in the case of a prescription, it must be proved as stated. Why? Because it is the same thing as a contract—the prescription supposing a contract or deed to have been executed, and therefore by the same rule you must prove it, as set out according to the principle applicable to such cases. But that doctrine has not been extended to cases of *tort* where the right is mere inducement to the action. In the present case the plaintiff is entitled to judgment for damages, if he has any right upon this common, the right having been interrupted by the injurious act of the defendant. All that it is necessary for him to shew is, that he has a right of common, and that that right has been disturbed by the defendant. It is stated and proved, and we must take it, that the damages were given in proportion to the injury done to the right as proved. It has been established since the reign of *James* the First, in the

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case alluded to, (*a*) that where the party complains in *tort*, the title is mere matter of inducement, and that it is not necessary to prove it. There Chief Justice *Lea* doubted upon the matter, but the judgment was given in conformity with the opinion of the other three Judges. The same doctrine is recognized by Chief Justice *De Grey*, Mr. Justice *Blackstone*, and Mr. Justice *Nares*, in *Wynn* v. *White*; (*b*) and in *Bertie* v. *Beaumont* (*c*) the Court decided upon the very same principle, Lord *Ellenborough* saying that the right was mere matter of inducement, and not necessary to be proved in the extent in which it was alleged. All that is necessary to prove in this case is, that the plaintiff had some right, which right had been violated by the act of the defendant. The only difficulty that can occur to any man on a subject of this sort is as to the evidence to be used for the purpose of establishing a right to common as appurtenant to land independent of the messuage. There might be some reason for requiring that that point should be proved before the plaintiff could recover. But my Lord Chief Justice has completely removed all difficulty upon that point, for in order to effect that object, all that is necessary to do may be done in this case, viz. by taking the verdict specially, according to the proof given on the trial. If the plaintiff had only a right of common in respect of the land, I think the defendant has no right to complain of the verdict as taken in respect of that right. I think the verdict ought to be so, and it appears to me that we should be doing an act of great injustice if we were to turn round the present plaintiff and put him to bring a new action against a man who has been proved to be a wrong doer. Under these circumstances I think there is no pretence for a new trial.

Rule discharged.

(*a*) *Eardley* v. *Turncock*, *Cro. Jac.* 629. (*b*) 2 Sir *Wm. Bla.* 840. (*c*) 16 *East.* 33.

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By the 53 G. 3. c. 102. sec. 10. future effects of a discharged insolvent are liable, and therefore bail who have taken the benefit of that act cannot justify unless the debts from which they were discharged have been since paid. Bail on coming up to justify, guilty of gross prevarication, may be committed to the custody of the marshal. (a)

CURTIS *against* SMITH.

ANDREWS opposed the justification of one of the bail in this case, on the ground that in the year 1815 he had taken the benefit of the Insolvent Debtors' Act, and therefore, as his future effects would be liable, he could not justify.

The bail being examined, said that he had since paid all his debts; but on being pressed to name any of the debts which he had so paid, he mentioned three or four of a very small amount. Being asked to specify some large debt, he mentioned one of 40*l.*, but on being urged to state the time when this was paid, he said he had not paid it; that he had misunderstood the question, and otherwise prevaricated. Upon which

BEST J. interposed and said,—I shall commit this man until *Monday*. It is high time that the Court should exercise its authority in cases of this description. It is hard upon a creditor that he shall first run the risk of having bad bail put in as a security for his debt; and secondly, if the bail when they come up to justify are guilty of wilful and corrupt perjury, he shall be put to the trouble and expense of prosecuting a

(a) Vide *Royson's* case, *Cro. Car.* 146. Bail committed by *Whitlock* J. for prevarication and stating he possessed property which he afterwards denied; and afterwards confessing his crime on examination by the Court, he was adjudged to be committed to prison and stand upon the pillory with a paper mentioning the cause, viz. " for false bail," and to be brought into the Courts of K. B. C. P. and Exchequer; and this, on his confession, was recorded in Court without other proceedings against him: And see *Anon.* C. B. 1 *Stra.* 384. Court will not set aside allowance of bail on the ground that one of them has sworn to a false account of his property, if it do not appear that the defendant or his attorney was privy to the bail's misconduct. *A'Becket* v. —— 5 *Taunt.* 776. C. P.

worthless man. It too frequently happens that persons of this description escape punishment, from the unwillingness of parties to put themselves to the expense of a prosecution for perjury. It is fit in a case of this nature that the Court should take this matter into their own hands, and I shall commit this man until *Monday*, and then let him apply to the Court, and they will dispose of him as they think proper.

The offender was accordingly committed to the custody of the Marshal, and the other bail was rejected.

On the same day the learned Judge committed another person to Newgate, who had come up to justify as bail, and had grossly perjured himself, and prevaricated in his answers.

These persons were brought before the Court on the *Monday* following; and *Andrews* for the plaintiff in the one case, and *Chitty* for the plaintiff in the other, being asked whether they were instructed to make any application against the offenders? and having replied that they were not,

ABBOTT C. J. after conferring with the other Judges, addressed the offenders to the following effect: The practice of putting in bail of this description has of late years greatly increased. The contempt imputed to the persons before the Court is a very great and enormous offence. Putting in bail of this description is almost always accompanied by perjury. The two persons who are now before the Court, and all others who have acted like them, are open to a prosecution for perjury. But independent of this liability, their conduct is a great contempt of the Court itself; for nothing can be more improper than for a person coming in the first instance and saying that which he is not able to maintain on being further examined. False assertions of this kind are a very high contempt. Such contempt has in former times been punished very

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Curtis *against* Smith.

severely by the Court, (*a*) but of late it has not often occurred that the Court itself has interfered. In the case before us, the interference of the learned Judge was most proper, by committing the offending parties. Trusting, however, that the example which has hitherto been made of these parties, may operate to deter others from attempting the like imposition, and considering that both are at this moment open to an indictment and prosecution for perjury, if the persons on whom the fraud was attempted to be practised think proper to adopt such proceedings, we do not think it necessary further to extend the term of their imprisonment, and therefore they may be now discharged.

Discharged accordingly.

(*a*) *Royson's* case, *Cro. Car.* 146.

Friday, Feb. 5th.

Doe *on the demise of* James *against* Staunton.

A mere servant of the beneficial occupier of an estate cannot be made a defendant in ejectment; but where a servant in the visible occupation of premises assumes the character of the tenant in possession, he is liable to be made defendant, and his conduct is evidence to go to the jury to presume that he is the tenant in possession, unless that fact is rebutted by other evidence. (*a*)

EJECTMENT to recover the possession of a wharf and other premises mentioned in the declaration. At the trial before *Garrow* B. at the last assizes for *Worcestershire*, it appeared in evidence that the defendant upon whom the declaration in ejectment was served

(*a*) In moving for judgment against the casual ejector, the affidavit must state that the declaration was served on the *tenant* in possession; and it is not sufficiént to swear that it was served on the *person* in possession of the premises. *Doe* dem. *Robinson* v. *Roe*, *T.* 35 *Geo.* 3. *Tidd*, 6th ed. 509. As to the meaning of the word tenant, see *Co. Lit.* 1. Service before the essoign day of the Term, on the servant or child of the tenant in possession is not sufficient, unless the *tenant* has acknowledged that he received the declaration before the essoign day, *Roe* dem. *Hambrook* v. *Doe*, 14 *East.* 441. *Doe* d. *Wilson* v. *Roe*, *Adams'* Ejectment, 2d ed. 209.

was in fact only a servant in the employment of the owner of the premises. It appeared that when he was served with the declaration, he did not repudiate the idea of his being the tenant in possession, but, on the contrary, he said to the witness, "You might have served me with this on the wharf yesterday." It was also proved that the defendant appeared to the action, and in fact the cause went down to trial under a conviction on the part of the lessor of the plaintiff that the defendant was the tenant in possession. But it being proved in evidence that the defendant was merely the servant of the real tenant in possession, *Garrow* B. directed a nonsuit. In *Michaelmas* Term *Puller* obtained a rule calling on the defendant to shew cause why the nonsuit should not be set aside and a new trial granted.

Campbell now shewed cause. It must be taken upon the report that the defendant was not the tenant in possession of the premises in question, but was in fact only the servant of the tenant; and therefore as there was no personal service of the declaration in ejectment upon the tenant in possession, the nonsuit is right. The true criterion whether the ejectment could be sustained against this defendant is, whether he himself can maintain an action against a wrong doer. It is clear he cannot, because he has not the legal possession of the premises. It is clear that this defendant was not the tenant in possession; and if so, the action cannot be maintained against him. In the case of *Doe* on the demise of *Jones* v. *Wylde*,(a) it appeared that the defendant was the bailiff of the tenant in possession, and the Court held, that it was not competent for the tenant in possession to prove that he himself and not the de-

(a) 5 *Taunt.* 183.

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fendant is the possessor of the land. But that case does not at all bear upon the present question, because there, although the defendant was only the bailiff of the tenant in possession, it was held that it was not competent for the defendant to examine a witness who is interested in the event of the suit, without considering for what particular purpose he is called. That was the only point decided in that case, and therefore it did not go to shew that ejectment would lie against the bailiff. In *Doe on the demise of Foster* v. *Williams*, (a) it was held that a tenant in possession is not a good witness to support his landlord's title, because it is to uphold his own possession. But that authority does not apply in this case, because here the present defendant is not the tenant in possession, and therefore if he is not, ejectment cannot be maintained against him. There would be nothing to prevent this defendant from being a witness on behalf of the landlord's title, because he would have no interest in upholding the apparent possession contended for in this case. If then he could be a witness in this case, this action cannot be maintained. There is no express authority to shew that ejectment will lie against a mere servant in possession of his master's premises. This case is clearly distinguishable from *Doe* v. *Stradling*, (b) tried before *Bayley* J. where it appeared that the lessor of the plaintiff had let the premises for one year certain, and at the expiration of the year the tenant continued in possession, and there it was very properly held, that as there was no other person against whom the action could be brought, the ejectment would lie; but his Lordship does not lay it down as a rule that ejectment can be maintained against a servant or other person apparently in possession.

(a) *Cowp.* 621.

(b) 2 *Starkie's* Repts. 187.

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DOE *against* STAUNTON.

[BAYLEY J. Very likely one's first thoughts at Nisi Prius may be wrong, and I am extremely sorry that they are ever reported, and still more so that they are ever mentioned again, at least so far as my Nisi Prius decisions are concerned, because I think they are entitled to very little weight. What is said by a Judge upon a trial is merely the first impression of his mind on a point coming suddenly before him, and which he has had no opportunity of considering beforehand.]

Campbell continued. The mere actual occupation of a person in possession proves nothing, unless it is shewn that he is the beneficial occupier. It is a general rule in obtaining judgment against a casual ejector, that the affidavit must shew that the person upon whom the declaration is served is the tenant in possession. In *Goodtitle* on the demise of *Read* v. *Badtitle*, (a) it was held that the mere acknowledgment of the wife of the tenant in possesion, that she has received a declaration in ejectment, will not bind the husband. It is true that service upon one of several joint tenants will be good as to all, (b) but in all these cases the Court always looks most anxiously to see that the tenant in possession is the person served, and not the mere servant. But the strong and decisive objection to this action is, that it cannot be maintained, unless it is shewn that the party against whom it is brought is in such a situation as to be able to maintain an action of trespass. No such circumstance appears in this case, and therefore the decision of the Court below is decisive.

Puller, in support of the rule. It appears to be too strong a proposition, that the Court ought to presume that this defendant was merely a servant, and not the tenant in possession. There was abundant presumptive evi-

(a) 1 *Bos. & Pul.* 384.

(b) *Doe* dem. *John Bailey* v. *Roe*, 1 *Bos. & Pul.* 369.

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dence of occupation by this person as the tenant. Undoubtedly that evidence was capable of being explained by other evidence on the part of the defendant, shewing what the nature and true character of his occupation was. It was competent for him to prove that he was merely the servant, and not the occupier. Although the case made out on the part of the plaintiff might have been answered, yet standing unanswerd as it was, the case ought to have been left to the jury. This person was the apparent occupier of the wharf—nobody else was found there who could be considered as the tenant in possession. It is very true that the rates payable in respect of these premises were paid in a different name, and that the rates stood in the name of another person. But it very frequently happens that the name of a preceding occupier stands in the books of the collector long after another tenant comes in; and therefore that is a fact extremely equivocal in the present case. What may be the effect of the answer given to the plaintiff's case on another trial it is impossible to anticipate, but it is too much to say that a servant cannot be made a defendant in ejectment under any circumstances. There may be cases where the servant is the actual occupier, and may thereby be entitled even in his own name to maintain trespass.

Bayley J. It is not necessary that the party should be in such a situation as to be able to maintain trespass in order to subject him to an action of ejectment. I think that if he appears in the visible occupation of the property, that is quite sufficient to subject him to this action; and I think in this case there was abundant evidence to justify the plaintiff in treating this defendant as a proper person against whom the ejectment should be brought. It appears that the plaintiff serves a person whom he supposes to be the tenant in possession, and by so doing he gives that person the

opportunity of explaining the true character and nature of his situation. It is in the power of the party either to mislead or set the plaintiff right, by his conduct. He may set him right by shewing that he is mistaken in supposing him to be the tenant in possession; or he may mislead by acquiescing in the service of the declaration, without any observation upon the subject. If a party under such circumstances, thinks proper to mislead, I do not think he has much right to complain in a court of justice of any hardship in being made the defendant to an ejectment, when he brings that hardship upon himself by his own conduct. When this defendant is served with the ejectment, he does not say, "I am not the tenant in possession;" but he says, "If you had come yesterday, you might have served me on the wharf." Is that the natural conduct of a mere servant uninterested in the possession of the premises? But that is not all; he appears to the ejectment. Why did he appear to the ejectment if he was a mere servant? If he had explained the true character of his occupation, he never would be liable to an action for mesne profits, unless his occupation was in the character of tenant. But the answer which he gives at the time of the service, and his conduct afterwards, is in my opinion abundantly sufficient evidence to have gone to the jury to consider him as in the true occupation of the estate, so as to make him liable. I therefore think that this rule must be made absolute.

HOLROYD J. I think there was sufficient evidence to have gone to the jury, so as to support the ejectment against this defendant. The defendant's conduct at the time he is served with the declaration in ejectment seems to me to be sufficient to shew that he at least assumed the character of a tenant in possession, because he does not say, "I am only the servant—I am not in possession—I am only acting for my master;" but he says,

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"You might have served me yesterday upon the wharf." I am therefore of opinion that there was evidence to have gone to the jury, for them to presume that he was the tenant in possession, particularly when coupled with the subsequent fact of his appearing to the action and pleading in the character of a tenant in possession.

Best J. An action of ejectment cannot be brought against a mere servant, where he unquestionably appears to be such. But in this case it appears that though this person may in fact be a servant, yet that he was the visible tenant in possession carrying on the business apparently for his own benefit, and assuming by his language and demeanor the character of a beneficial occupier. (*a*)

Rule absolute.

(*a*) *Abbott* C. J. expressed no opinion.

Friday, Feb. 5th.

Thorpe *against* Beer.

Defendant had applied to a Judge in vacation to set aside plaintiff's execution for irregularity, on a ground which the Judge overruled; the defendant having brought a writ of error before final judgment signed, but not having communicated that fact to the Judge, afterwards applied to the Court to set aside the execution, on the ground that he had before brought a writ of error. *Held* that this fact not having been communicated to the Judge on the former application to him, defendant was now too late to take advantage of the irregularity. (*a*)

Gaselee on a former day obtained a rule calling upon the plaintiff to shew cause why the writ of execution issued in this case should not be set aside with costs for irregularity, the irregularity being that there was a writ of error sued out before final judgment was signed.

(*a*) Where a Judge refuses an order, the party, if dissatisfied, should apply to the Court, and not to another Judge at chambers, *Wright* v. *Stevenson*, 5 *Taunt.* 850. post.

Comyn now shewed cause; and from the affidavits he produced, it appeared that on the 27th of *July* the plaintiff executed a writ of inquiry—that on the 11th of *November* the plaintiff's attorney served a rule upon the defendant to be present at the taxation of costs before judgment was signed—that on the 12th the defendant brought a writ of error, returnable on the 29th of *December*—that on the 21st of *November* the plaintiff proceeded to the taxation of his costs, and that on the 30th of the same month he entered up final judgment, and took out execution. On the following day the defendant's attorney applied to a Judge at chambers to set aside the execution, on the ground that the defendant had not received written notice of the taxation of costs; but it appearing that he had had verbal notice, the learned Judge dismissed the application as groundless and without any foundation. It was sworn that on that occasion the defendant's attorney did not say a single word about the writ of error having been brought, and that the plaintiff knew nothing of it until the present application to the Court. The affidavits further stated, that the action was brought in *Hilary* Term last for goods sold and delivered, and that the defendant had previously and subsequent to the judgment threatened to delay the plaintiff in the recovery of his debt as long as he could, and that he had carried his threat into execution by sham pleading and otherwise. The learned Counsel admitted that the allowance of the writ of error would operate as a supersedeas, but he contended, that before the plaintiff could be brought into contempt by taking out execution, he ought to have had notice of the writ of error; and therefore as he had not had such notice until he was served with the present rule, the irregularity was waived. In all events, if this rule was discharged, it would not stop the proceedings upon the writ of error.

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THORPE *against* BELL.

Gaselee in support of the rule said, he was instructed that when the parties appeared before Mr. Justice *Best*, at chambers, upon the summons for setting aside the execution, it was distinctly stated that a writ of error had been brought [*Best* J. I have no recollection of this transaction; but I am quite certain that if that fact had been stated, I should not have dismissed the application.] It was positively sworn that the writ of error was brought previous to the taxation of costs, and the question was, whether, under the circumstance stated, this execution should not be set aside as irregular. He cited *Hawkins* v. *Jones*, (a) where it was held that a writ of error operated as a *supersedeas* from the moment of allowance, though the plaintiff be proceeding at a distant place in ignorance of the allowance.

ABBOTT C. J. We think that this rule ought to be discharged. The Court ought, as far as it can, to prevent these contrivances for delay, which are attended with great inconvenience to the plaintiff and with great expense to all the parties, and not more so to the plaintiff than to the defendant. It is generally considered that a party who is applying to set aside any proceeding, ought on his first application to state all the grounds why he prays that it may be set aside. (b) That was not done in this case. The party applied to one of the Judges in vacation (which is the same thing) to set aside the execution, upon the ground that he had not been served with written notice of the taxation of costs. If he had succeeded in that application, and the

(a) 5 *Taunt.* 204. *Tidd*, 1172, 3.

(b) *Greathead* v. *Bromley*, 7 *T. R.* 455. *Thornton* v. *Dunply*, 1 *H. Bla.* 101. *Schuman* v. *Weatherhead*, 1 *East.* 537. *Wright* v. *Stevenson*, 5 *Taunt.* 850.

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THORPE *against* BEER.

execution had been set aside on that ground, the plaintiff would be allowed to tax his costs, and in a few days afterwards to take out a new execution, and that new execution might be set aside, or an application made to the Court to set it aside upon the ground of a subsisting writ of error, of the allowance of which the defendant knew at the time he took out his first summons. Now, we think that the defendant ought to have communicated that circumstance in the first instance, and it is upon the ground of his having forborne to do so, thereby inducing the plaintiff to take another step, attended with expense, which would be rendered fruitless, that we are of opinion that the defendant ought not to be suffered to take advantage of his own misconduct.

Comyn hoped that the rule would be discharged with costs.

ABBOTT C. J. The rule must be discharged without costs. It is somewhat a new point, and the Court has not come to this conclusion without some little difficulty.

Rule discharged without Costs.

MERRYMAN *against* QUIBBLE.

Friday, Feb. 5th.

Affidavit to set aside proceedings on the bail-bond after notice of render had been given, must state that the application is made *bona fide* on behalf of the bail, but time given for producing further affidavit. (*a*)

READER, on a former day, obtained a rule calling on the plaintiff to shew cause why the proceedings on the bail bond in this case should not be set aside, on

(*a*) The rule K. B. *Mich.* T. 59 *Geo.* 3. directs that no rule shall be drawn up for setting aside an attachment regularly obtained against the sheriff, for not bringing in the body, or for *staying proceedings regularly commenced on the*

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MERRYMAN *against* QUIBBLE.

the ground that the bail had given notice to the plaintiff's attorney of surrendering the defendant before proceedings commenced on the bond.

V. Lawes now shewed cause against the rule, and submitted two objections to the affidavit upon which it was obtained: 1st, That the deponent stated that he had given notice of the surrender "to the plaintiff's attorney *or* his clerk;" and, 2d, That the affidavit did not state, in conformity to the rule of last Term, that the application was made *bonâ fide* on behalf of the bail.

Reader acquiesced in the latter objection, but trusted that the Court would make the rule absolute, subject to the production of an amended affidavit, that the application was made *bonâ fide* on behalf of the bail.

Rule absolute on this condition.

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assignment of any bail-bond, unless the application for such rule shall, if made on the part of the original defendant, be grounded upon an affidavit of merit, or if made on the part of the sheriff or bail, or any officer of the sheriff, be grounded upon an affidavit, shewing that such application is really and truly made on the part of the sheriff or bail, or officer of the sheriff, as the case may be, at his or their own expense, and for his or their own indemnity, and without collusion with the original defendant, 2 *B. & A.* 240. The rule of *Trin.* 1 *Ann.* K. B. directed, that on notice of the render given to the plaintiff or his attorney, all further proceedings against the bail or manucaptors upon the recognizance shall cease; and where, after notice of render, plaintiff still proceeded against the bail in an action of debt on the recognizance, because no offer was made to pay the costs in the suit against him, nor any rule obtained to stay proceedings on payment of costs, the Court of K. B. held the subsequent proceedings irregular, *Byrne* v. *Aguilar*, 3 *East.* 306. *Creswell* v. *Hern*, 1 *M. & S.* 742.

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ANONYMOUS.

Friday, Feb. 5th.

Writ of latitat served on the 25th of *January*, but not tested until the 30th, on which day it was returnable bad, but the objection waived, the defendant's attorney having written to the plaintiff's attorney on the 28th, undertaking to appear, receive a declaration, and give security for costs. (*a*)

WALFORD moved to set aside the writ of *latitat* on the ground of irregularity, it appearing that the writ was served on the 25th of *January*, but tested only on the 30th, on which day it was returnable. He thought it necessary however to state, that on the 28th of *January*, before the return of the writ, the defendant's attorney wrote a letter to the plaintiff, stating that he would appear and receive a declaration, and at the same time offered security for costs. The time for appearing was not yet out.

ABBOTT C. J. At the time the defendant's attorney wrote that letter, he had not discovered the error in the writ. I think, however, he is bound by his undertaking. This is not the time therefore for him to take advantage of the objection. The writ is in itself defective, but the defendant's attorney has waived the objection by undertaking to appear, and consequently it is now too late to avail himself of it.

Rule refused.

(*a*) A party cannot in general object to irregularity after he has taken subsequent steps, 1 *East.* 78. *Pearson* v. *Rawlings*, K. B. *Fletcher* v. *Wells*, 6 *Taunt.* 191, 2. 1 *Marsh*, 550, S. C. C. P. 1 *Moore*, 299. Appearance cures irregularity in process, *Widdrington* v. *Charlton*, 1 *Stra.* 155. *Murray* v. *Hubbart*, 1 *Bos & Pul.* 647. By rule of K. B. *M.* 1654. sec. 10. an attorney of either bench accepting a warrant, or subscribing a process, declaration, or warrant to appear, is compelled to cause an appearance to be entered, or liable to an attachment or to be put out of the roll, as the case requires; and the party is not to be received to countermand such appearance after his retainer. An attorney will be compelled to perform an undertaking to appear, though it was given under a false statement by the sheriff's officer, that he was desired by defendant to direct the attorney to appear, *Lorymer* v. *Hollister*, 1 *Stra.* 693.

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Friday, Feb. 5th.

DAVIS *against* TUDDENHAM.

Where the rule for better bail was served on the 14th of *January*, and the bail did not justify until the 19th, *Held* that the plaintiff's procedendo was regular. (*a*)

ESPINASSE, on a former day obtained a rule, calling on the plaintiff to shew cause why the writ of *procedendo* in this case should not be set aside with costs, for irregularity.

Andrews now shewed cause, and submitted that the writ was perfectly regular. The only question was, whether the defendant had justified bail within the time prescribed by the rules of the Court. The rule for better bail was served on the defendant on the 14th ult. and the justification did not take place till the 19th; and therefore, as the practice was that the defendant must justify within four days, the plaintiff's proceedings were regular.

Espinasse was heard in support of his rule; but

THE COURT said, that the practice was as above stated. The defendant ought to have put in good bail in the first instance, and he would have had no reason to complain. The object of the defendant seemed to be to gain time, and had therefore resorted to this contrivance for delay, and the Court would give no encouragement to such practices.

Rule discharged with Costs.

(*a*) Where the plaintiff intends to object to the bail put in on habeas corpus, he obtains a rule or order from a Judge for better bail, which will entitle him to a procedendo unless bail are perfected in four days after service of the rule, *R. M.* 16 *Car.* 2. note c. and thereupon the same or different bail must justify, as in other cases, within four days, if the rule be served in Term, and so many days of the Term remain; but if served in vacation it is sufficient for the defendant to give notice within the time allowed by the rule, of a justification on the first day of the ensuing Term. *Tidd*, 408. cites *Bourne's* New Guide, K. B. 249, &c. See Prac. Dict. 2 vol. 679, 680.

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MARKET *against* GORDON.

Friday, Feb. 5th.

Where bail described himself as having property to a great extent, and the Court directed inquiry, which the bail eluded by running away, the Court would not permit rule for the allowance of bail to be entitled of the Term, the bail came up to justify, and discharged the application with costs. (*a*)

HOLT on a former day obtained a rule, calling upon the plaintiff to shew cause why the rule for the allowance of bail in this cause should not be entitled as of last *Michaelmas* Term.

Comyn now shewed cause, and from the affidavits which he produced in answer to the rule, it appeared, that in *Michaelmas* Term last the defendant's bail having come up to justify, and one of them having given a very questionable account of his sufficiency, the Judge then sitting directed that the plaintiff's attorney should accompany the bail to his house, to ascertain whether the property, of which he described himself to be possessed, consisting of haberdashery goods, was visible on his premises; that accordingly the plaintiff's attorney went with the bail towards his house, but that before they had proceeded as far as the *Haymarket*, in their way towards the premises, the bail ran off, and could not afterwards be found. Upon this affidavit he submitted that this rule ought to be discharged with costs.

Holt, in support of his rule, endeavoured to shew that the bail having run away in the manner described, was no answer to this application, because this circumstance was occasioned by the plaintiff's attorney having directed the indignation of the populace towards him, by representing that he was Jew bail, and that he had come forward to swear to property of which he was not in possession.

(*a*) Defendant is bound to know the circumstances and character of his bail, see ante 7.

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MARKET *against* GORDON.

ABBOTT C. J. I am of opinion that all that passed both before and after the bail ran away, is quite immaterial to the question. The fact of his running away is quite sufficient evidence of his unwillingness, if not of his incompetence to justify. He had previously declared that he was ready to submit his supposed property to the test of inspection, but as soon as he got out of the verge of the Court he thought proper to run away. If he had been an honest man, he would have returned again to the Court, after having shewn his property; but not having done so, I think the defendant is entitled to no indulgence.

Rule discharged with Costs.

Friday, Feb. 5th.

WILCOX *against* NEWMAN.

Declaration with special counts for a contribution to repairs of a party wall, defendant being owner of improved rent of adjoining house, and the common money counts. Plea to the whole declaration that *R. N.* in his lifetime was the owner of the improved rent, and that defendant is only entitled as his executor; that there are bonds outstanding and *plene administravit præter*, a sum insufficient to pay the demand in first count. Plea held bad on demurrer. (*a*)

DECLARATION against the defendant for a contribution towards the expense of repairing a party-wall between a house belonging to the plaintiff, and the adjoining house, whereof the defendant was owner, and entitled to the improved rent. There were the usual counts for money laid out and expended to and for the use of the defendant, money counts, &c. To this declaration the defendant pleaded, first, the general issue

(*a*) Where a plea begins with an answer to the whole declaration, but in truth the matter pleaded is only an answer to part, the whole plea is bad, and the plaintiff may demur, *Everard* v. *Paterson*, 6 *Taunt.* 647. 2 *Marsh*, 304, S. C. But Ni. Pri. 54. 1 *Saund.* 4th ed. by Serjt. *Williams*, n. 3. But if a plea begin only as an answer to part, and is in truth but an answer to part, it is a discontinuance, and the plaintiff must not demur, but take his judgment for the part unanswered, as by *nil dicit*; for if he demurs, or pleads over, the whole action is discontinued, *Tippet* v. *May*, 1 *Bos. & Pul.* 411. *Herlakenden's* case, 4 Rep. 62. a. *Weeks* v. *Peach*, 1 *Salk.* 179. *Market* v. *Johnson*, 1 *Salk.* 180. 1 *Saund.* 28. n. 3,

non assumpsit; and second, for a further plea, "that before the building and finishing the party-wall in the declaration mentioned, one *Robert Newman* was the owner and person entitled to the improved rent of the adjoining building in the said declaration mentioned, and being such owner, and being so entitled afterwards, to wit, and before the building and finishing of the said party-wall, died, having first made his last will and testament, whereby he appointed the said defendant executor thereof, the execution of which the said defendant took upon himself, and as such executor, and in no other right whatsoever, became the owner, and personally entitled to the improved rent of the said adjoining building; and the said defendant further saith, that said *Robert Newman* in his lifetime, to wit, &c. by his certain writings obligatory sealed with his seal, entered into certain bonds for the payment of certain sums of money, and that he the said defendant hath fully administered the goods and chattels of the said *Robert Newman* in discharge thereof, and that he hath no funds in his possession more than the sum of ten pounds," &c. To this plea thus set forth in substance there was a demurrer, and joinder in demurrer.

Platt, in support of the demurrer, objected that this plea was bad, because it was a general plea to the whole declaration, and there was no plea to the counts for money paid for the use of the defendant. The plea of *plene administravit* might be good as to the first count, but the other counts remained unanswered and *non constat*; but the defendant had more effects than to the amount alleged in his plea to answer the demand. Therefore upon every principle of pleading the defendant's plea was insufficient.

Heath, in support of the replication, admitted that the plea was defective, but as the real question between

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WILCOX *against* NEWMAN.

the parties was whether the defendant, as executor, had fully administered the effects of his testator, he trusted that the Court would permit him to amend his plea on the production of an affidavit verifying the fact that he had fully administered the testator's effects in discharge of certain bonds executed in his lifetime, and that the defendant had not assets in his hands exceeding 10*l.* in amount.

ABBOTT C. J. You don't plead that you have no assets to pay this demand, but your plea is, that you have not assets to pay the demand as set forth in the first count of the declaration. For any thing that appears in the plea, the defendant may have received profits from the premises over and above what is sufficient to discharge the bonds. But the principal objection is, that the plea does not go to the money counts. However, you may have liberty to amend on an affidavit verifying the fact, that you have fully administered the testator's effects.

Judgment for the plaintiff, with liberty to amend.

Friday, Feb. 5th.

LORIMER *against* LULE.

On setting aside a judgment and execution for irregularity, the Court will restrain the defendant from bringing an action of trespass, unless a strong case of damages be shewn. (*a*)

A. MOORE shewed cause against a rule obtained on a former day for setting aside a judgment in an action of debt on simple contract and execution

(*a*) So in an action of *Wilson* v. *Kingston*, *Mich.* Term A. D. 1816, where the defendant moved to be discharged out of custody on a *capias ad satisfaciendum*, on the ground that such writ recited a prior *fieri facias*, and levy under it of goods of a value less than the debt, but omitted to state the sheriff's return of such writ, and therefore the *capias ad satisfaciendum* for the supposed residue was illegal, according to 2 *Marsh*, 78. though the Court upon hearing *Curwood* for the plaintiff and *Chitty* for the defendant made the rule absolute;

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levied thereon with costs. He admitted that the defendant had duly appeared before judgment signed, and consequently such judgment was irregular; but he submitted that as the affidavit of the plaintiff's attorney stated that the defendant had applied for the indulgence, and that the judgment had been signed by mistake, the rule ought to be absolute without costs, and that the plaintiff ought to be precluded from bringing any action of trespass for the levy under the irregular execution.

Chitty in support of the rule urged, that as the defendant's affidavit swore to a defence on the merits, and that as the plaintiff's attorney was apprized that there was an irregularity in the proceedings before the execution was levied, he the plaintiff ought not only to pay the costs, but also that the defendant should be at liberty to prosecute an action for the injury he had sustained. But

The COURT said, " When a defendant applies to us to set aside proceedings for irregularity, we have a discretionary power of imposing upon him just and equitable terms as a condition or qualification of our interference; and we shall not suffer a party so applying to prosecute an action of trespass, merely on ac-

yet they imposed upon the defendant the terms of not bringing an action of trespass. But in *Simmons* v. *Johnson*, *Easter* Term 1818, upon a motion to set aside a *fieri facias* for irregularity, on the ground that a writ of error had been allowed before the issuing of the *fieri facias*, the Court after hearing *Denman* for the plaintiff and *Chitty* for the defendant, made the rule absolute, for setting aside the execution; leaving the defendant at liberty to proceed against the sheriff for damage occasioned by misconduct in the levy, though they restrained him from proceeding against the plaintiff. But unless the Court impose terms upon the defendant at the time the rule is made absolute, he will be at liberty to bring an action for the irregularity, and consequently it is necessary at the time of shewing cause to pray the Court to impose such terms.

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count of such a slip in practical accuracy. When a case of malicious issuing or undue execution of process is laid before us, we will impose no such restraint, but this is not a case of that description. However, as the proceedings are irregular,

Rule absolute with Costs."

Friday, Feb. 5th.

TILLEY *against* HENLY.

Affidavits sworn before the time of shewing cause, although after the time mentioned in the rule *nisi*, may be read, unless by the terms of the rule it be required that they shall be filed by a particular day. Where a rule to set aside proceedings is moved with costs, and the affidavits are answered, it must be discharged with costs. (*a*)

CHITTY on a former day moved for a rule to shew cause (expiring on *Monday* the 1st *February*) why the proceedings and the *latitat* in this case should not be set aside with costs on an affidavit by the defendant and another person, stating that the defendant was christened by a different Christian name from that named in the writ, and had always been called and known by that name and no other; and the defendant swore that she had never, directly or indirectly, represented herself, or permitted others to represent her, to be of the name described in the writ.

Curwood now shewed cause upon an affidavit of two persons sworn on the 3d of *February*, two days after the rule for shewing cause had expired, stating in positive terms that the defendant had gone by the Christian name stated in the writ.

Chitty in support of the rule submitted, that affidavits sworn after the day appointed by the rule *nisi* for shewing cause, could not be read; and that in all

(*a*) See *Hoar* v. *Hill*, ante 27. as to the time of filing affidavits. But the party moving for a rule cannot, without withdrawing his motion and moving it again, make use of affidavits filed after he obtained his rule *nisi*, *Ditchett* v. *Tollett*, 3 *Price* Rep. 257.

events if they could, as they were contradictory affidavits, the court would not subject the defendant to the costs of the application; but

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Per Curiam. Affidavits sworn before the time of shewing cause, although after the time mentioned in the rule *nisi*, may be read, unless by the terms of the rule it be required that the affidavits shall be filed by a particular day; and as the rule *nisi* was moved with costs, and the plaintiff has positively contradicted the defendant's affidavits, the rule must be

Discharged with Costs.

DEACON *against* MORRIS.

Friday, Feb. 5th.

Treble costs are recoverable by the plaintiff, who recovers treble damages in an action on 29 *Eliz.* c. 4. against the sheriff for taking more than the fee allowed by that statute on levying under an execution against the plaintiff's goods. (*a*)

THIS was an action on the case against the Sheriff of *Hertfordshire*, on the statute 29 *Eliz.* c. 4. at the suit of the party aggrieved, to recover treble damages sustained by the extortion of the defendant's bailiff, under a writ of *fieri facias* against the plaintiff's goods. On the trial, the jury found a verdict for the plaintiff, damages 20*l*. And on a former day, *Marryatt* obtained a rule to shew cause why the plaintiff should not have awarded to him treble damages and treble costs.

Chitty now shewed cause against the rule. He admitted, that though the statute 29 *Eliz.* c. 4. was

(*a*) In legal contemplation, costs form part of the damages, *Phillips* v. *Bacon*, 9 *East.* 298. Double or treble costs are not to be understood to mean according to the literal import of the terms twice or three times the amount of single costs. Where a statute gives double costs they are calculated thus: *first*, the common costs, and then half the common costs. If treble costs, first the common costs; 2ndly, half of these, and then half the latter, *Tidd*, 6th ed. 1023.

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silent as to costs, yet it was decided in *Tyle* versus *Glede*(a), that costs were recoverable. He also admitted, that it had been laid down in several cases, that although a statute giving treble damages is silent as to the costs, yet the plaintiff shall recover treble costs (b); but he contended, that this doctrine was not tenable, not being founded on principle; because, though a statute may give treble damages for the injury already sustained, there was no reason why the plaintiff, in seeking to recover such damages, should have more than the ordinary costs of the suit; and it was unreasonable, that besides the treble damages the plaintiff should also recover treble costs, exceeding the actual expense he had incurred in the action. He also contended, that the treble damages ought not to be treble the sum assessed by the jury, but settled in the same manner as treble costs in other cases, viz. the sum assessed by the jury—half that sum, and then half the latter sum. He submitted, therefore, with respect to the costs, that where the act of parliament was silent upon that subject, the plaintiff could only recover the costs which would be allowed by the Master on a common law judgment. The rule for giving treble costs in such cases as this, was not founded upon any express principle recognized by statute law, but merely upon the *dicta* of Judges on certain penal statutes. The difficulty in this case was, that though the legislature had thought fit to provide that the party should pay three times the damages found by the jury, yet there was no reason why he should pay three times the costs after the legislature had prescribed a certain mode of punishment. The statute of *Gloucester* certainly did not operate to add

(a) 7 T. R. 267.

(b) *Cowp.* 368. *Dyer*, 159. b. *Cro. Eliz.* 582. *Hullock* on Costs, 2d ed. 17. *Gilbert* on distress, by *Hunt*, 64.

costs to such damages as were given by subsequent statutes.

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Maryatt in support of the rule was stopped by the Court.

ABBOTT C. J. The rule in these cases I have always understood to be this, that wherever a statute subsequent to the statute of *Gloucester* increases damages to the double or treble value, where damages were before given, the plaintiff shall recover costs, and those costs shall also be doubled or trebled, as the statute may be. That is laid down by *Aston* J. in *Wilkinson* v. *Allot* (*a*). It is said that the only authority for this rule is the *dicta* of Judges; but if these *dicta* have been since judicially acted upon, we are bound by the authority of those decisions. It is said that the statute of *Gloucester* does not operate to add costs to those damages which are given by subsequent statutes. The answer to that is, that it has been decided that it shall; and therefore we are bound by the decisions which have taken place upon this subject.

BAYLEY J. By the common law, the whole of the judgment given is damages, and therefore must not the common law of judgment be trebled under the statute upon which this action is founded? Suppose there had been no Act of Parliament which directed that the plaintiff should recover treble damages, it cannot be doubted that if only single damages were recovered, the amount of the costs would only be referable to such damages. It is true that it may be said that the plaintiff in recovering treble damages, would not incur the expense of three suits; but it is to be recollected that the jury in finding treble damages only find those damages which

(*a*) Cowp. 368.

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the party has sustained, and the treble costs follow as a legal consequence of that finding; and it has been held, notwithstanding the statute of *Gloucester*, that the party shall recover such costs. It appears to me, therefore, that the rule in this case, on the authority of judicial decisions, must be made absolute.

HOLROYD J. The argument in this case, that the party is only entitled to the single costs, is contrary to decided cases. The language of the Court in the case in *Cowper* in entering the judgment, shows that the costs are part of the damages, and so they have been considered in all the cases decided upon this subject. The rule is, that a party shall recover such sum for his damages as he shall sustain by reason of the grievances complained of; and it is upon that principle that the costs are estimated in the damages.

The damages which the jury give on the trial or inquisition, are those which the party sustains previous to the commencement of the suit, and the costs which follow the judgment are to be estimated as part of the damages which the plaintiff has sustained. It has been decided over and over again, and is now quite settled, that in actions upon this statute the parties are entitled to recover treble costs upon the treble damages, the costs and charges being considered as the consequence of the damages sustained.

BEST J. concurred.

Rule absolute.

Chitty then submitted that the costs should be taxed by the Master in the manner above suggested.

ABBOTT C. J. We give no directions as to the taxation of costs. That question must be left to the Master; and if the defendant is aggrieved by his assess-

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DEACON *against* MORRIS.

ment, he may apply to the Court. The declaration here is in case.

BAYLEY J. The statute does not say a word about the damages to be assessed. (*a*)

(*a*) It appears from *Brooks's* Ab. Tib. damages, pl. 70; *Sayer's* Law of Damages, page 244; that treble damages are not calculated or assessed by the Court in the same manner as treble costs, for in that case the jury having upon the statute against forcible entries given 20*l.* damages, the Court awarded that he should have 40*l.* more; and the case of *Thorogood* versus *Scroggs*, *Cro. Eliz.* 582. is to the same effect.

DOE *on the demise of* BROMLEY *against* ROE.

Friday, Feb. 5th.

Service of a declaration in ejectment on one of four tenants is bad, unless the affidavit shews that they are all in possession.

ROBINSON moved for judgment against the casual ejector, on an affidavit of the service of the declaration in ejectment on one of four tenants in possession, by delivering the same to that tenant, and explaining to him the contents thereof; and he submitted that this was sufficient service for the purpose of obtaining judgment on the authority of *Doe* v. *Roe*, (*b*) where it was held that service of a declaration in ejectment on one of two tenants in possession is good service on both.

HOLROYD J. I think this service is not sufficient, because the affidavit does not shew that all the four tenants were actually in possession. It does not appear that they are joint tenants, for, in that case, service of the declaration on one would be good service on all. The affidavit must shew that they were all in possession, for *non constat* that all the tenants were in possession.

Rule refused.

(*b*) 1 *Bos. & Pul.* 369.

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Saturday, Feb. 6th.

KIBBLEWHITE *against* JEFFREYS.

Judgment of *non pros* set aside on an affidavit that the debt and costs had been paid previous to signing, although the defendant swears that the money was not paid with his privity. In shewing cause against a rule, the party must be prepared with affidavits in support of his whole case, and cannot after shewing cause come on another day in the same Term with better affidavits.

RUSSELL on a former day obtained a rule calling on the defendant to shew cause why the judgment of *non pros* signed in this case should not be set aside for irregularity, the irregularity being that the debt and costs were paid before the judgment was signed.

Merewether now shewed cause upon an affidavit, that neither the defendant's agent nor himself knew any thing of the debt and costs having been paid, and that if they were paid, it was without the privity, knowledge, or consent of the latter. This affidavit, he submitted, was a sufficient answer to this application, for even supposing the debt and costs were paid without the defendant's knowledge, he might still be called upon hereafter to pay the money.

Russell in support of the rule said, that this application was made upon an affidavit which stated that the action had been compromised, and that the whole debt and costs had been paid on the 1st of *February*, either by the defendant or by some person on his behalf, notwithstanding which judgment had been signed by the defendant. He suggested, that in the affidavit on the other side it was not denied that some person or other had paid the debt and costs.

BEST J. (*a*) said, that certainly the affidavit against the rule was drawn in very puzzling terms, and was calculated to deceive the Court. The rule must therefore be absolute.

(*a*) The only Judge in Court.

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KIBBLEWHITE *against* JEFFREYS.

Merewether said, he expected another affidavit in the course of the morning which would be more satisfactory, and therefore he hoped he should be at liberty to mention the case again.

BEST J. You ought to be prepared to answer the rule in the first instance; but if the other side do not offer any opposition, you may mention the case again.

The rule was made absolute conditionally.

Merewether applied to open the rule again on *Thursday* the 11th of *February*, on a better affidavit; but

ABBOTT C. J. said it was now too late, the case had already been heard, and it could not be heard again.

Rule absolute.

GOULD *against* BERRY.

Saturday, Feb. 6th.

The justification of bail may be set aside under circumstances of gross imposition, and fraud on the part of the bail. (*a*)

ANDREWS moved for a rule, calling upon the defendant to shew cause why the justification of bail in this case should not be set aside, on an affidavit stating that one of the bail had falsely sworn to the solvency of his circumstances; it appearing on inquiry, after he had justified, that he had been lately discharged under the Insolvent Debtors' Act, although he had sworn that he was never in custody in his life. With

(*a*) If bail have sworn to a false account of their property, without the privity of the defendant or his attorney, it is said that the plaintiff has no other remedy than by indictment for perjury. *A'Becket* v. ——, 5 *Taunt.* 776. C. P. *Per Curiam*, If the plaintiff can by any means connect the defendant or the defendant's attorney with the false swearing of the bail, the Court will punish them; and the Court has the means to do so, for the one is the suitor, the other the officer of the Court. But if the bail have falsely sworn without the privity of the others, the plaintiff has no other remedy than by indictment for perjury.

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GOULD *against* BERRY.

respect to the other bail, the affidavit stated that he was not a housekeeper, and that, at the time he came up to justify, he had improperly personated the inhabitant of the house to which reference was given in the notice of justification. Under these circumstances, he trusted the Court would set aside the justification.

BEST J. (*a*) said, he never knew an instance of an application of this kind being granted by the Court. He remembered making similar motions himself when at the Bar, but he had never known them acceded to. Undoubtedly he had a very strong feeling with respect to irregularities in the practice of bail, but it appeared to him that the present application was like moving for a new trial; and as no instance could be cited of the like kind, he was unwilling to establish a precedent.

Chitty, amicus curiæ, said, that a few Terms ago he had obtained a rule *nisi* to discharge the recognizances of bail on a strong affidavit of three persons as to some improper practices on the part of the bail, and shewing that the defendant's attorney was privy to such misconduct; and in that case the rule had been made absolute, and the defendant's attorney personally subjected to the costs.

The *Master* said, that one of the bail mentioned in the present case had been since rejected in another cause, in which he had come up to justify. (*b*)

BEST J. upon this representation granted a rule *nisi*, which on a subsequent day was made absolute, as of course.

Rule absolute.

(*a*) The only Judge in Court.

(*b*) It is a good ground for setting aside the allowance of bail, that they are afterwards rejected in other causes. E. T. 1813, *May* 14 and *June* 13. MSS. cases.

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GOULD *against* BERRY.

Friday,
Feb. 12th.

Defendant having applied to take money out of Court under 43 G. 3. c. 46. on the ground of his having put in and perfected bail, and a rule having been afterwards obtained by plaintiff for setting aside allowance of bail, and the defendant was then rendered, the Court directed the money to be paid out to defendant, after deducting the costs of the two rules. A defendant who has rendered is entitled to take the money out of Court.

ANDREWS in the latter part of the day shewed cause against a rule obtained yesterday by *Hutchinson,* calling upon the plaintiff to shew cause why the money deposited in the hands of the sheriff by the defendant on his arrest in lieu of bail, and since brought into Court by the sheriff in pursuance of the stat. 43 *Geo.* 3. c. 46. sec. 2. should not be paid out to the defendant; the latter having put in and perfected bail.

Andrews now urged that this rule had been improperly obtained, because obtained pending the above-mentioned rule for setting aside the justification of the bail. That rule having been now made absolute, and no cause shewn by *Hutchinson,* the Court could not make the present rule absolute, because it had been obtained solely on the ground that the bail had been put in and perfected; but that ground had now completely failed. The present rule ought not to have been moved for, unless the rule for setting aside the bail had been discharged. Under these circumstances, the rule for the defendant's taking the money out of Court must be discharged with costs.

ABBOTT C. J. As I understand the case, it is this, the defendant first obtained a rule to have the money paid out of Court, upon a suggestion that the bail had been put in and perfected. The plaintiff then moved to discharge the allowance of bail on the ground of misconduct on the part of the defendant, and in that motion he has succeeded. If that be so, the defendant's rule for paying the money out of Court falls to the

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Gould against Berry.

ground, because, in fact, as it turns out, the bail have not been put in and perfected; but then it is said, that as the defendant has surrendered, it is sufficient to entitle him to have the money paid out of Court. I apprehend that is not within the terms of the 43 *Geo.* 3. c. 46.

Hutchinson in support of the rule relied upon *Harford* v. *Harris*, (a) where it was held, that if a defendant who pays the debt and 10*l.* costs to the sheriff in lieu of bail under 43 *Geo.* 3. c. 46. puts in bail above, who, being excepted to, render him instead of justifying, the plaintiff is not entitled to receive out of Court under § 2. the money so deposited, but the defendant may in such case receive back his deposit.

Abbott C. J. It seems to me that the best mode of disposing of this rule is to direct that the costs of the first rule for paying the money out of Court, and the costs of the rule for setting aside the rule for the allowance of bail, should be paid out of the money in Court, and that the residue should be paid to the defendant.

The rest of the Court concurred.

Rule absolute, subject to these conditions.

(a) 4 *Taunt.* 669. The same point has been determined in K. B. *Chadwicke* v. *Battye*, 3 *M.* & *S.* 283.

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The KING *against* FRANCIS DAMAN, Esq. and Others.

Saturday, Feb. 6th.

A conviction on the stat. 5 G. 3, c. 14. for taking fish without the consent of the owner, must expressly state, as well in the information as in the evidence, that the prosecution was carried on at the instance and on the behalf of the owner of the fishery; and should state that the offence was committed without the consent of such owner. *Quære*, Whether it is sufficient to state that the defendant took several fish, without specifying the number? And whether there can be separate convictions against several defendants, where only one joint offence has been committed? And whether it is sufficient to state in the conviction that a witness who was sworn on behalf of defendant could say nothing touching the matter in question, for and on behalf of the said defendant? And whether the owner himself must not be the informer? (a)

AT the last Easter Quarter Sessions holden at the Castle of *Winchester* in and for the county of *Southampton*, the defendants were convicted on the 5 *Geo.* 3. c. 14. for unlawfully taking and destroying several fish with a net, in a certain part of the river Avon running in a certain inclosure and grounds within the manor of Avon Tyrrell, being the property of the Honourable *Ann Fane* widow, lady of the said manor; and the conviction was afterwards removed into this Court by writ of *certiorari*.

Chitty argued against the conviction. There were several objections to this conviction. *First*, it did not appear that the Honourable *Ann Fane*, the alleged owner of the fishery in question, authorized or directed the prosecution before the magistrates; nor did it appear to have been proved on the hearing of the information, that the owner of the fishery had not actually consented to the defendant's fishing in the manner in which he was charged. *Secondly*, the number or quantity of fish taken, killed, or destroyed by the defendant

(a) The 5th *Geo.* 3. c. 14. s. 3. enacts, that in case any person shall take kill or destroy, or attempt to take kill or destroy any fish in any river or stream, pond, pool, or other water, (not being in any park or paddock, or in any garden, orchard, or yard adjoining or belonging to any dwelling house, but shall be in any other inclosed ground which shall be private property) every such person, being lawfully convicted thereof by the oath of one or more credible witnesses, shall forfeit and pay for every such offence the sum of 5*l.* *to the owner or owners of the fishery* of such river, stream, or water, or of such pond, pool, moat, or other water. And this enables a magistrate to convict, or the owner may proceed by action.

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The King *against* Daman.

was not stated. *Thirdly*, it appeared by the affidavits upon which the *certiorari* for removing the conviction was obtained, that there was one joint information against this defendant and four others fishing together with a net; and the magistrates had returned five several convictions for five several penalties, when only one joint offence appeared to have been committed. The *fourth* objection was, that the evidence given before the magistrates on behalf of the defendant was not set forth. As to the *first* objection, it was observed, that though the magistrate recited in the conviction, that Sir *Henry Fane*, of *Avon*, in the county of *Southampton*, at the instance and on the behalf of the Honourable *Ann Fane*, widow, lady of the manor of Avon Tyrrell, came in his proper person before the justice, and gave the information afterwards set forth in the conviction; yet it did not appear to have been sworn or proved on the hearing of the information that the Honourable *Ann Fane* had authorized or directed the prosecution for the supposed offence. By the first and third sections of the 5 *Geo.* 3. c. 14. on which this conviction was founded, it appears that the legislature only intended to give the penalty to the party aggrieved, and that it affords him the option of proceeding either by information or by action; consequently no common informer can be the prosecutor, but the proceeding must be instituted and prosecuted in the name of the owner of the fishery, for otherwise any person, without the concurrence of the owner, might prosecute, and the owner might lose the option of proceeding by action, and he might either be deprived of the penalty, or the defendant might be liable to pay it over again, on account of the first proceeding not having been authorized by the owner of the fishery. It is a general principle, that when a compensation is given only to a party aggrieved, no third person can proceed for the same. It was therefore established in the case

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THE KING *against* DAMAN.

of The *King* v. *Corden*, (*a*) that the information and proceedings must be at the instance of the owner of the fishery. The same point was decided in the case of The *King* v. *Mallinson* (*b*). It must also appear, that on the hearing of the information it was proved in the presence of the defendant that the owner of the fishery did not consent to the act complained of; and it should also appear, when the information is not in the name of such owner, that it was proved that the prosecution was instituted with the authority of the owner. The statement of that fact in the information (which is a mere *ex parte* proceeding) is not, it was submitted, sufficient to sustain the conviction. It must be positively proved before the magistrate before he can convict the offender. That was stated in the conviction set forth in the case of The *King* v. *Edwards*, (*c*) although in that case the conviction was quashed upon another point. In the case of The *King* v. *Rogers*, (*d*) which was an indictment on 42 *Geo.* 3. c. 107. for coursing a deer in an inclosed ground, it was held necessary on the part of the prosecution to call the owner of the deer as a witness to prove that he did not give his consent to the prisoner to course them. This was a decisive authority, for *non constat*; but in this case the lady of the manor gave the defendant leave to fish in the river in question. He also referred to The *King* v. *Green*, (*e*) which was a conviction on this very statute, and there it was held necessary to give evidence that the owner of the fishery did not give his consent to the act complained of. He said that there were three other objections to the conviction; (*f*) but the Court called on

(*a*) 4 *Burr.* 2279. (*b*) 2 *Burr.* 679.

(*c*) 1 *East.* 278. (*d*) 2 *Camp.* 654. (*e*) *Hil.* 24 *Geo.* 3. B. R.

(*f*) 2d *Objection.* The information and evidence should have stated how many fish were taken, *King* v. *Marshall*, 2 Keb. 594. An indictment for fishing in a fishery and taking away *divers fish* was bad at common law, and it is material that the information should apprize the defendant of the nature

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Casberd to answer this first objection; who contended that the objection taken on the present occasion is not

of the charge against him, in order that he may prepare for his defence. It is clear that an indictment against a party for stealing divers fish, not specifying the number, would be insufficient, *Paley on Convictions*, 82. Indictment for engrossing a great quantity of straw and hay, without mentioning what quantity, quashed for uncertainty, *Anon. Cro. Car.* 380. Conviction on 43 *Eliz.* c. 7. s. 1. for cutting down *divers* lime-trees, quashed; and per *Holt* C. J. in trespass, the nature and number of things ought to be mentioned, and much more in a conviction where all imaginable certainty is requisite, *Rex* v. *Burnaby*, 2 Lord *Raym.* 900. And in *Rex* v. *Gibbs*, 1 *Stra.* 497, an indictment for selling in unlawful measures divers quantities of beer was held bad. 3d *Objection.* It appears by the affidavits that one joint information was exhibited against five different defendants, for a joint offence in jointly using one net in the fishery. This was but one offence, and therefore although under the terms of the act the defendants might be respectively liable for such offence in the sum of 5*l.* each, yet the magistrate had no right to make several separate convictions, the *King* v. *Drake*, 2 *Shower*, 489. Deer stealing act, 3 *W.* & *M.* c. 10, declared, that if any person or persons should unlawfully course or hunt, &c. any deer, without consent of the owner, and should be convicted thereof, every person so offending by unlawful hunting, &c. should forfeit for every such offence 20*l*; upon this statute it was resolved, that every person concerned in a joint act of coursing forfeits 20*l.*; and one single conviction of several persons with an award of distinct penalties against each was held to be right. *Paley on Convictions*, 160, the offence is joint, though the penalties are several. The statute 5 *Geo.* 3. describes the joint acts of several persons as one offence, and therefore the magistrates had no right to subject the parties to the expense and inconvenience incident to separate convictions. 4th *Objection.* The conviction professes to set out the evidence given on behalf of the defendant, but nevertheless does not state either in words or in effect what that evidence was. The *King* v. *Clarke*, 8 *T. R.* 220. The magistrate ought to set forth in the conviction the whole of the evidence given both for and against the defendant. In the present case it was stated, that *Stephen Parsley* was sworn, but the magistrates have not thought proper to state what evidence he gave. The *King* v. *Lovet*, 7 *T. R.* 152 Conviction on 5 *Ann*, c. 14, setting forth in the deposition "that the defendant did keep and use a certain dog called a setting dog, and also a certain engine called a gun, to kill and destroy the game." The Court, after hearing affidavits on both sides, came to an opinion that the magistrate had not acted corruptly, but might have been misled by the precedent in a former case of the *King* v. *Thompson*, 2 T. R. 24; and therefore would not grant a criminal information, but at the same time expressed in strong terms that it is the duty of magistrates in all cases to state the whole of the evidence and not merely the result. *Paley on Convictions*, 126, *Boscawen*, 103. "Cases on 5 *Ann.* c. 14, form an exception in favour of a particular class of convictions, and afford the strongest confirmation of the general rule. And as the Court has been careful, in these cases, to ground their judgment upon precedent alone, magistrates ought not to be misled by these instances to adopt the

now available, because it is not grounded upon any informality in the information, but is founded altogether upon the evidence offered to support the conviction; inasmuch as it does not appear to have been proved at the hearing of the information, that the Honourable Lady *Fane* did not consent to or authorize the prosecution against the defendant. Now that objection does not apply to any supposed defect in the information before the magistrate. If the information fully and correctly sets out the charge, that is quite enough to satisfy the requisites of the statute, which does not require what is here contended for. There is nothing said in the clause on which this conviction is founded, with respect to the owner of the fishery being the complainant, or as to the fact being, stated to be done without his or her consent. The objection taken is, that it does not appear upon the information exhibited before the magistrate, that this was a proceeding by the owner of the fishery; but that is not necessary, for the reason just stated, and therefore whatever argument may arise upon that subject, that is not a ground which arises out of the express words of the statute, but is an argument founded upon implication only. The argument drawn from The *King* v. *Mallinson*, (a) and The *King* v. *Rogers*, (b) is wholly inapplicable to this case, because those cases apply rather to some imperfection in the evidence than to the form of the information. In the case of The *King* v. *Mallinson*, which was a conviction upon the statute 22 & 23 *Car.* 2. it was a necessary ingredient in the case, to prove that

same general mode of stating the result of evidence, instead of the evidence itself, in convictions for any other offence than that to which those cases are confined." It is merely stated in the present case, that *Parsley* did not give any evidence for and on the behalf of the said *Moses Watson*; but, from the manner in which this is stated, it must be inferred that he gave some evidence, and that evidence, though inconclusive, ought to have been set forth.

(a) 2 *Burr.* 679. (b) 2 *Camp.* 654.

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the act was done without the consent of the owner, whereas in the third section of this statute no such words are to be found. The like observation applies to The *King* v. *Rogers*, where the words "without the owner's consent" being necessarily averred in the indictment, the fact must consequently be proved, and therefore these cases are quite inapplicable to the present. The only objection taken to the form of the information is, that it is not stated on oath that this was a proceeding at the instance of the owner of the fishery; but that objection is answered by again referring to the third section of the act, in which there is nothing stated to shew that the proceeding must be by the owner of the fishery. What is objected to is matter arising from inference, and is not a necessary ingredient in the case. In the case of The *King* v. *Corden* (*a*) there was a radical defect, because it was a mere naked information at the suit of a common informer, without shewing that it was at the instance of the owner of the fishery, and therefore that is not a case in point. The same observation applies as to The *King* v. *Edwards*. (*b*) On the whole therefore, as the information was set out according to the terms of the act of parliament, and as the objection was merely matter of inference, and not of substance, the conviction was good in the terms set forth.

Chitty, in reply, was stopped by the Court.

BAYLEY J. (*c*) Upon a conviction, nothing can be supplied by argument or by intendment. You are to look to the conviction alone for the purpose of seeing whether the case is brought within the terms of the act of parliament. This act of parliament for a particular

(*a*) 4 *Burr.* 2279. (*b*) 1 *East.* 278.

(*c*) *Abbott* C. J. was absent at the sittings at Guildhall.

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offence directs that the party shall forfeit and pay 5*l.* to the owner of the fishery. The forfeiture is given to the owner of the fishery, and to him only, and it is given to the owner of the fishery if the party is convicted. The penalty is either to be recovered by information before a magistrate, or by action at law. If by action, it necessarily follows that that action must be brought in the name of the person to whom the penalty is given; and in the case of information also, it appears to me, that by necessary intendment, the act of parliament requires either that it must be brought in the name, or it must appear satisfactorily upon the face of the proceedings, that it is by a third person at the instance of the owner of the fishery. And I think that the mere language or recital of the justice, by which he says "that it is at the instance of the owner of the fishery," is not sufficient to make out that proposition—but that proposition must either be imbodied in the information or afterwards established by proof, or that it must be made out in some other way, and not merely by the assertion of the justice in that respect. The conviction in this case begins by saying, "Be it remembered, that on a particular day Sir *Henry Fane*, at the instance and on the behalf of Mrs. *Fane*, came before the justice, and gave him to understand and be informed," &c. Now what warrant he had for saying that it was at the instance and on the behalf of Mrs. *Fane*, does not appear upon the face of the conviction. His sources of information therefore, in that respect, are concealed. Whether it was communicated to him by Sir *Henry Fane* or Mrs. *Fane*, or in what other way he could come to make that assertion, we don't know; but there is nothing in the case proceeding from any of the parties which leads to that conclusion. Well, then it states the information, and prays that the forfeiture may go to Mrs. *Fane*, as the owner of the fishery. Then it states, that on the day on which the hearing was to take

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place, Sir *Henry Fane* appears on behalf of the said *Ann Fane*. It is not then repeated or said that it is at her instance—and there is a distinction between appearing *on behalf* of a person and appearing *at the instance* of a person; because, when it is alleged that it is *at the instance*, that means in consequence of a prior authothority; but when you say it is *on the behalf*, that may be without any previous communication. Well, then the party appears to answer to the said complaint "on the said information, and having heard the same read, and Sir *Harry Fane* being present before us, and having offered the evidence aforesaid, and praying that the defendant might be convicted thereof, the said *Francis Daman* is asked whether he has any thing to say against the conviction in form aforesaid." He then hears the information read. Now the information is perfectly silent as to the person at whose instance these proceedings are instituted. It merely states, that on a particular day he fished in the fishery. Why then he is called upon to answer the charge, without being apprized at whose instance the charge is made, and without having that person called to shew that he had any authority in that respect. If that had been introduced as part of the information, why then I think the plea of Not Guilty would have thrown it on the prosecutor to sustain it, because it is an essential part of the body of the information. But it is not only not introduced into the information, but even the evidence is entirely silent as to the question at whose instance the prosecution is instituted. It appears to me, therefore, that from the nature of the case, when the penalty is given to the owner of the fishery, by suing the defendant, either by information or by action, the proceedings before the magistrate must necessarily be confined either to those interested or conducted in their names, or it must appear that the proceedings are at the instance of the party injured. It is necessary that it should appear one

way or the other. So far as we can judge from the conviction, the language there used emanates from the magistrate, and is not that which arises from the case itself. This material statement must either be embodied in the information, or it must afterwards be established by proof. But inasmuch as that is not the case here, I think this conviction must be quashed.

Holroyd J. I am of opinion that the objection taken is fatal to this conviction. It is a rule in convictions of this description, being summary proceedings before a magistrate on a particular act of parliament, that after conviction nothing can be intended so as to get rid of any defect in point of form. Every thing necessary to support the conviction must appear on the face of the proceedings, and must be established by regular proof, or by the admission of the party of that which is not proved. It is stated in this conviction, by way of memorandum, that the person comes to give the information to the magistrate, and that he does so at the instance and on the behalf of the Honourable *Ann Fane*, and that he gives the justice to understand and be informed so and so; and then it appears, as stated in the information, that the defendant had forfeited for his said offence the sum of 5*l.* and that the judgment of the magistrate is, that the defendant is required to answer that complaint. A warrant then issues on the 31st of *January*, in order that the party may be found to answer the complaint on a subsequent day. On the 2d of *February* the defendant is brought forward, and then the information is stated to have been read over to him. It does not appear that there was any communication made to the defendant with respect to the charge alleged by Sir *Henry Fane* that he prosecuted at the instance of the lady of the manor, and I think it ought to appear substantially that that was so, or at least that the defendant dispensed with the proof

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of that fact, for by law Sir *Henry Fane* could have no authority to prosecute except at the instance of the owner of the fishery, or unless it appeared upon the proceedings that that circumstance was distinctly admitted. That principle is quite decisive according to the case of The *King* v. *Corden*. The doctrine there decided is, that in particular offences no person has a right to come before a magistrate for the purpose of supporting a penal conviction, unless it be on the complaint of the person who is interested in making such complaint, and therefore it does not give a power to a stranger to do so. On the 2d of *February*, when the parties come again before the magistrate, Sir *Henry Fane* prays that the defendant may be convicted, but there is no proof that he does that at the instance of the lady of the manor. It might be, though it does not necessarily follow, that he had authority to carry on the prosecution until conviction, but no intendment or inference is sufficient to make that out, for it ought expressly to appear on the face of the proceedings. The first part of the proceedings might be at the instance of the lady of the manor, but the subsequent proceedings not so. Therefore the authority with respect to the latter ought to be established by proof, or at least be distinctly admitted by the defendant, in order to dispense with such proof. It appears to me that that does not sufficiently appear on the face of these proceedings, and therefore that this conviction must be quashed.

Best J. It does not appear upon the face of this conviction that it is at the instance of the lady of the manor, or that the owner of the stream of water had authorized these proceedings; and that being the case, I see nothing to prevent this lady from bringing an action against this defendant, if the proof is sufficient to sustain such a proceeding. A party ought not to have

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an information brought against him on this statute, without being fully apprized that it is at the instance of the owner of the fishery. I cannot help thinking that in one respect this case is different from The *King* v. *Corden*, for in this case there is a statement that the party did not fish with the authority of the owner of the fishery, but at the same time I think that the judgment in that case is applicable to the present, because it ought to appear that the justice has jurisdiction of the case laid before him. In order to give the justice jurisdiction, it must appear that the proceedings are instituted by the owner of the fishery. In this case it does not appear that there is any complaint on the part of the owner, nor does it appear to have been made with her consent. In the case referred to, the Court says, "that it should in some way or other appear that the proceedings are instituted with the consent of the owner." That must appear upon the face of the proceedings, or that it is at least with the approbation of the owner, for otherwise the conviction cannot be sustained. The Court in the case of The *King* v. *Corden* seemed to think that evidence of that sort is necessary, and there is no such evidence in this case. It is said, however, that this is implied by the act of parliament, but as the act of parliament gives the penalty only to the owner, that shews that it is necessary to prove that the information is at the instance of the owner. But here it is not proved, either that this fishery was private property, or that the particular person named in the information was the owner. Under these circumstances the same objection occurs as was relied upon in the case of The *King* v. *Corden*; and therefore the conviction must be quashed.

Conviction quashed.

The conviction in question was in the following form :—

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The conviction in the above case on 5 *Geo.* 3. c. 14. s. 3. for taking fish in a private fishery in enclosed ground, but not being in a park, paddock, garden, orchard, or yard, &c. (*a*)

County of Southampton to wit. BE it Remembered, That on the 31st January A.D. 1818, at *Sopley*, in the county of *Southampton*, Sir *Henry Fane*, of *Avon* in the said county of *S.* K.C.B. at the instance and on the behalf of the honourable *Anne Fane*, widow, lady of the manor of *Avon Tyrrel*, in the said county, came in his proper person before me *James Jopp*, Esq. one of the justices of our Lord the King assigned to keep the peace of our said Lord the King in and for the said county, also to hear and determine divers felonies, trespasses, and other misdemeanors committed within the same, and one of the three justices whose hands and seals are hereunto subscribed and set, and upon oath to him by me then there administered upon the Holy Gospels of God, gave me the said justice to understand and be informed, that on *Thursday* the 22d *January* A. D. 1818 aforesaid, at *S.* aforesaid, in the county aforesaid, *Francis Daman*, of *Ringwood*, in the county aforesaid, gentleman, did take, kill and destroy with a net several (*b*) fish in a certain part of the river *Avon* which ran in certain inclosed grounds within the said manor, being private property, and did land his said net, with the said fish therein, upon a certain copyhold garden in the occupation of one *William Tuck*, within the said manor at *S.* aforesaid, in the county aforesaid; the said *F. D.* having so acted as aforesaid without the authority of the said *A. F.* and without and against her consent, contrary to the form of the statute in that case made and provided, she the said *A. F.* being then and there owner of the said part of the said river, and of the fishery of the same, and the said *F. D.* not then and there having any just right or claim to take, kill, carry away, or destroy any fish in that part of the said river, and the said part of the said river wherein the said fish were so taken, killed and destroyed, by the said *F. D.* as aforesaid, not then being in any park or paddock, or in any garden, orchard, or yard adjoining or belonging to any dwelling-house, but then being in other inclosed grounds then being private property at *S.* aforesaid, in the county aforesaid, whereby, and by force of the statute in that case made and provided, the said *F. D.* hath forfeited for his said offence the sum of 5*l.* to the said *A. F.* the owner of the fishery aforesaid: (*c*) Whereupon the said Sir *H. F.* on behalf of the said *A. F.* lady of the said manor, and owner of the fishery aforesaid, prayed the judgment of me the said *J. J.* so being such justice as aforesaid, in the premises, and that the said *F. D.* might be forth-

(*a*) If the fishery was not in inclosed grounds, then the proceeding should be on 22 *Car.* 2. c. 25, s. 7.*

(*b*) Here the number and description of the fish taken should have been stated, as "divers, to wit, ten perch, ten carp," &c. Ante 149- n. *f.*

(*c*) It should here have at least been stated, that the informer swore before the magistrate that he was authorized to prosecute by the owner of the fishery, as thus: "And the said Sir *H. F.* upon his oath aforesaid further giveth me the said justice to understand and be informed, that he the said Sir *H. F.* hath been and is duly authorized by the said *A. F.* the said owner of this fishery, and at her instance and on her behalf, to inform me the said justice of and touching and concerning the said offence, and to prosecute the said *F. D.* for such offence, with the intent to recover the sum of 5*l.* pursuant to the statute in that case made and provided, for and on the behalf of the said *A. F.* And thereupon the said," &c.

with apprehended and brought before me to answer the said complaint: whereupon afterwards, to wit on this 2d day of *February* instant, being by virtue of a certain warrant for that purpose issued by me the said *J. J.* being such justice as aforesaid, brought before us *J. J. Benjamin Bullock*, and *Samuel Clapham*, whose hands and seals are hereunto subscribed and set, being respectively justices of our said Lord the King assigned to keep the peace of our said Lord the King in and for the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanours, in the same county done and committed, at *Christchurch* in the said county, to answer the said complaint contained in the said information, and having heard the same read, and the said Sir *H. F.* being also present before us, and complaining before us against the said *F. D.* aforesaid for the offence aforesaid, and praying that he may be convicted thereof, the said *F. D.* is asked by us the said justices if he can say any thing for himself, why the said *F. D.* should not be convicted of the premises above charged upon him in form aforesaid, to which the said *F. D.* saith that he is not guilty thereof. Nevertheless on the said 2d day of *Feb.* instant at *Christchurch* aforesaid, in the county aforesaid, *J. H.* of the parish of *Sopley* in the said county, servant to the said Sir *H. F.* a credible witness in this behalf, cometh before us the said justices in his proper person, and before us the said justices, to wit, on the said 2d day of *Feb.* instant, at *Christchurch* aforesaid, in the county aforesaid, being duly sworn touching the premises upon the Holy Gospels of God upon his corporal oath, to him the said *J. H.* then and there administered by us the said justices, we the said justices having then and there full power and authority to administer the said oath to the said *J. H.* deposeth, sweareth, and upon his oath aforesaid affirmeth and saith in the presence (*a*) of the said *F. D.* at *Sopley* aforesaid, in the county aforesaid, by means of a certain instrument called a net, take, kill, and destroy the fish (*b*) in a certain part of the said river *Avon* at *Sopley* aforesaid, in the county aforesaid, running by and adjoining ground in the occupation of the said *Wm. Tuck*, being inclosed ground within the said manor; which said part of the said river was not then nor is in any park or paddock, or in any garden, orchard, or yard adjoining or belonging to any dwelling house, but then was and is in other inclosed grounds then and there being private property, at *Sopley* aforesaid, in the county aforesaid; and that the said *Anne Fane* then and there was and still is the true and lawful owner of the said manor, and of the fishery of the said part of the said river; (*c*) and thereupon the said *F. D.* having

(*a*) Here add "and hearing."

(*b*) Here the description and number of the fish ought to have been stated.

(*c*) The following statement should here have been inserted: "And the said Sir *H. F.* a credible witness in this behalf, on the said 2d day of *February* instant, at &c. aforesaid, also cometh before us the said justices in his proper person, and before us the said justices being then and there duly sworn touching the premises upon the Holy Gospels of God, upon his corporal oath to him the said Sir *H. F.* then and there administered by us the said justices, we the said justices having then and there full power and authority to administer the said oath to the said Sir *H. F.* deposeth, sweareth, and upon his oath aforesaid affirmeth and saith in the presence and hearing of the said

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heard the said evidence so given against him as aforesaid, is asked by us the said justices if he can say or prove any thing in answer to such evidence, or shew why he should not be convicted of the offence charged upon him in form aforesaid; and because the said *F. D.* doth not nor can say any thing in his own defence touching or concerning the offence so charged upon him as aforesaid, or shew why he should not be convicted of the same offence, although he the said *F. D.* hath called before us one witness, that is to say, *Stephen Pardy*, who after having been duly sworn can say nothing touching the matter in question for and on the behalf of the said *F. D.* (*a*), and insomuch as the said *F. D.* has not proved or alleged that he had the authority or consent of the said *A. F.* being such lady of the manor and owner of the fishery aforesaid, nor shewn that he had or hath any just right or claim whatever so to do · therefore it is on the said 2d day of *February* instant, at, &c. aforesaid, by us the said justices adjudged upon the evidence of the said *J. H.* a credible witness as aforesaid, according to the form of the statute in such case made and provided, that the said *F. D.* is guilty of the offence so charged upon him as aforesaid, and that he the said *F. D.* be, and he is hereby convicted by us the said justices of the said offence, according to the statute in such case made and provided. And we the said justices do award and adjudge that for the offence aforesaid he the said *F. D.* (*b*) hath forfeited the sum of 5*l.* of lawful money of *Great Britain* to the said *A. F.* the owner of the fishery of the said part of the said river, to be paid as the statute aforesaid doth direct to us the said justices for the use of the said *A. F.* so being owner of such fishery as aforesaid. Given under our hands and seals, at, &c. aforesaid, this 2d day of *February* in the year of our Lord 1818 aforesaid.

J. J. (L. S.)
B. B. (L. S.)
S. C. (L. S.)

F D. that the said fishing and offence were done and committed without the consent of the said *Anne Fane*, contrary to the statute in such case made and provided; and that he the said Sir *H. F.* hath been and still is duly authorized by the said *Anne Fane*, the said owner of the said fishery, and at her instance and on her behalf, to inform us the said justices of and touching and concerning the said offence, and to prosecute the said *F. D.* for the same, with the intent to recover the sum of 5*l.* pursuant to the statute in that case made and provided, for the use and on the behalf of the said *A. F.*"

(*a*) It should have been stated more explicitly, either that he said nothing relating to the charge; or the particular evidence given by him should have been set forth. See ante 150 in notes.

(*b*) If several defendants are convicted for one joint offence, here say, "they the said *A. B.* *C. D.* and *E. F.* have each of them forfeited for their said offence the sum of 5*l.*" &c.

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BROWN *against* DAVIS.

Monday, Feb. 8th.

In an affidavit to hold to bail by a third person it is not necessary to state that he is the agent or attorney of the plaintiff; nor is it necessary expressly to negative the tender of Bank of England notes, if enough can be collected from the affidavit to shew that there was no tender. Where the first action is compromised and a second is brought for the same cause, the Court will not set aside the bail bond unless the proceedings appear to be vexatious. (a)

HUTCHINSON moved for a rule to shew cause why the bail bond in this case should not be delivered up to be cancelled on three grounds. 1. That the affidavit to hold to bail was made by a deponent without describing himself to be the agent or attorney of the plaintiff; 2. That the affidavit did not sufficiently negative the tender of Bank of *England* notes; and 3. That a former action had been brought and compromised, but renewed by the present proceedings for the same cause of action.

BEST J. If the defendant is not justly and truly indebted to the plaintiff according to the affidavit, the

(a) See *King* v. Lord *Turner*, ante 58, and *Bland* v. *Drake*, post 165. The incaution of a deponent in swearing to facts which it does not appear he could know, constitutes no objection to the affidavit to hold to bail, *Polleri* v. *De Souza*, 4 *Taunt*. 154. *Andioni* v. *Morgan*, *id*. 231. The 43 *G*. 3. c. 18. s. 2. does not cure the total omission in the affidavit of a negative of tender of bank notes, *Wood* v. *Jenkins*, 2 *Smith*, 156. *Tidd*, 193; but it cures *defects* in the clause of the affidavit which negatives the tender, unless it be sworn by defendant that no tender was made, 7 *Taunt*. 407 ante 58. By Rule *Mich*. 15 *Car*. 2, reg. 2, "It is ordered, that if a defendant shall be lawfully delivered from an arrest upon any process, the same defendant shall not be again arrested at the same time by virtue of any process at the suit of the same plaintiff; and if any attorney or plaintiff shall offend in the premises, the name of such attorney so offending shall be struck off the roll, and further as well the said attorney as the plaintiff in the said process named shall be respectively punished as to the Court shall seem just." Discontinuance of an action is not complete so as to entitle the plaintiff to arrest the defendant upon a fresh writ, until the plaintiff has taxed his costs. *Molling* v. *Buchheltz*, 3 *M*. & *S*. 153; and see *Cartwright* v. *Keely*, 7 *Taunt*. 192, where a defendant on being arrested, gave the plaintiff a draft for part of the demand, and agreed to settle the remainder in a few days; on which the defendant was discharged, but afterwards, on the draft being dishonoured, the plaintiff again arrested the defendant on the same affidavit, and the second arrest was held regular. *Puchford* v. *Maxwell*, 6 T. R. 52. Vide *Imlay* v. *Ellefsen*, 3 *East*, 309. *Tidd*, 6 ed. 176 to 179.

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deponent is liable to an indictment for perjury; and therefore it is not necessary for him to describe himself as agent of the plaintiff. With respect to the second objection, if there is any thing about the tender of Bank of *England* notes, that will do without expressly negativing it; and as to the third objection, as the arrest does not appear to be malicious, I think the bail bond cannot be set aside on that ground.

Rule refused.

Monday, Feb. 8th.

DOE *on the demise of* PAUL *against* HURST.

Service of declaration in ejectment upon executors of the late tenant in possession is insufficient, because the affidavit does not state that they are the tenants in possession. (a)

TINDAL moved for judgment against the casual ejector, on an affidavit stating that the notice of declaration was directed to Mrs. and Miss *Smith*, joint executrixes of the late tenant in possession; but the affidavit did not state that they were tenants in possession.

BEST J. said this was not sufficient.

Rule refused.

(a) *Doe* dem. The Governors of the Hospital of *St. Margaret, Westminster*, v. *Roe*, 1 *Moore* 113. A notice at the foot of a declaration in ejectment affixed to the door of an empty house, addressed "To the personal representatives" of the deceased tenant generally, was held insufficient, as, if there had been representatives who had taken possession, they should have been addressed by name; if not, the lessor of the plaintiffs should have proceeded, as in the case of a vacant possession. *Per Curiam*, There is no doubt but that the affixing a copy of the declaration on the door of the premises was sufficient, but the difficulty arises on the fact, whether the notice was properly addressed. It is directed to the personal representative or representatives of the deceased generally. If he had a representative who had taken possession, such representative should have been addressed by name; if there were no personal representatives, the lessor of the plaintiff should have proceeded as in the case of a vacant possession.

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Ex parte ANONYMOUS.*

Monday, Feb. 8th.

Where an attorney has continued to practise after his certificate has expired, through the inadvertence of a clerk who has been in the habit of getting the certificate renewed, the Court will readmit him without giving a Term's notice. (*a*)

GURNEY applied to readmit two attorneys of this Court without giving a Term's notice, and he grounded his motion on an affidavit which stated that these gentlemen had for a great many years regularly taken out their certificate, but for the current year they had received a notice from the Stamp Office that the duty was not paid. On inquiring into the cause of this notice, they discovered that one of their clerks, who had been in the habit of paying the duty, had neglected to do so for the current year through inadvertence. In support of his application he cited *ex parte Winter* (*b*).

BEST J. inquired of the Master, as to the practice, who said that the usual practice was to give a Term's notice; but his Lordship, on the authority of the case referred to, granted the application.

(*a*) The Court will not dispense with the necessity of a Term's notice, on readmission, on the ground of pecuniary embarrassments and illness, unless the attorney has discontinued practising during the interval. Ex parte Anonymous, 11th *February*, post 207. But where the certificate of an attorney in the country had been omitted to be taken out through the inadvertence of the agent in town, the attorney was readmitted without a Term's notice. Ex parte *Dent*, 1 *Barn.* & *Ald.* 187. The Court said, that there was not any rule of Court requiring the notice, but the Term was usually annexed to applications of this kind. The rule requiring a Term's notice on original admission is the *R. T.* 31 *Geo.* 3. 4 *T. R.* 379. and see *R. T.* 33 *Geo.* 3. K. B. 5 *T. R.* 368. In *Tidd's* Practice, 6 ed. 80. it is said, that in a late instance the Court required the like notice to be stuck up and entered as upon an original admission. Ex parte *Vaughan*, E. 45 *Geo.* 3. K. B.

(*b*) 1 *Barn.* & *Ald.* 190.

1819.

Monday, Feb. 8th.

The King *against the* Justices *of* ——.

Where the Court of Quarter Sessions confirmed an order of two Justices for stopping up a highway without proof that the order was previously made at a Special Sessions, and an application being made to this Court for a mandamus to enter continuances; *Held* that the Court would not interfere where the Sessions had already decided upon a point peculiarly within their jurisdiction. (*a*)

Campbell moved for a mandamus commanding the defendants to enter continuances on an appeal against an order made by two justices for stopping up a highway. The appeal came on to be heard at the last Quarter Sessions, and the order was confirmed. It appeared, however, that there was some irregularity in this proceeding, inasmuch as the order could not be confirmed, unless upon proof that the order for stopping up the highway was made at a Special Sessions. This was necessary, according to the authority of a case decided in last *Michaelmas* Term, where there was no such evidence; but, on the contrary, it appeared that the order for shutting up the highway was not made at a Special Sessions.

Per Curiam. The Sessions appear to have decided that point, and we cannot interfere where the Court of Quarter Sessions have decided a point peculiarly under their cognizance.

Rule refused.

(*a*) The 55 *Geo.* 3. *c.* 68. which gives the appeal to the Quarter Sessions, provides that if no such appeal be made, or being made, such order and proceedings shall be confirmed, by the said Court, the said inclosures may be made and the said ways stopped, and the proceedings thereupon shall be binding and conclusive to all persons whomsoever.

BLAND *against* DRAKE.

Tuesday, Feb. 9th.

In an affidavit to hold to bail made by the plaintiff's agent, (the plaintiff himself being abroad) the debt on a judgment being first positively sworn to, the subsequent statement that the judgment is still in force unpaid and unsatisfied, *as this deponent verily believes*, will not vitiate. An affidavit not entitled in the Court, but purporting at the foot to have been "sworn before *J. Y.* deputy filacer," is sufficient. An affidavit that the plaintiff is now a transported felon, cannot be read in answer to an affidavit to hold to bail.

CHITTY on a former day moved for a rule to shew cause why the defendant in this case should not be discharged out of custody on filing common bail, and why the plaintiff's attorney should not pay the costs of the bailable process, and also pay the costs of this application. He grounded his motion on two objections to the affidavit to hold to bail, and on an affidavit that the plaintiff was a transported felon. The affidavit to hold to bail was defective, because it was sworn by an agent of the plaintiff, who only deposed as to his belief that the money was due; and 2d, it was not entitled in Court, nor sworn before a Judge of the Court. As to the first objection, the affidavit to hold to bail was thus, "*William Yatman*, of, &c. gent. the attorney specially appointed by and agent of *William Bland* now residing in the town of *Sidney* in the territory of *New South Wales*, surgeon, maketh oath and saith, That *Richard Drake* is justly and truly indebted unto the said *William Bland* in the sum of 2037*l.* 13*s.* upon and by virtue of a judgment of the Supreme Court of Judicature in and for the territory of *New South Wales* aforesaid, recovered by the said *William Bland* against the said *Richard Drake* in the fourth Term A.D. 1817, which said judgment is still in force unpaid and unsatisfied *as this deponent verily believes*." The affidavit then negatived any tender in Bank of England notes according to the belief of the deponent. This affidavit, it was contended, was insufficient to hold the defendant to bail, because swearing by an agent as to the belief that the debt is due, was held by a great number of authorities to be insufficient. In *Rios* v. *Belifante* (*a*) the affidavit to hold to special bail was made by a merchant in *London* swearing that the

(*a*) 2 *Stra.* 1209.

1819.

BLAND *against* DRAKE.

defendant owed the plaintiff 270*l.* as appeared by an affidavit made by the plaintiff in *Amsterdam*, which the deponent believed to be true, and the Court said "there can only be common bail, for the oath abroad is no ground for our process, and then there is nothing but the belief of a third person, which is not sufficient." In the case of *Claphamson* v. *Bowman* (*a*) the plaintiff's bookkeeper swore that the defendant was indebted to the plaintiff in 3400*l.* for money had and received by the defendant to the use of the plaintiff, as this deponent verily believes, and the Court held it not sufficient to hold the defendant to special bail. And in the case of *Van Morsell* v. *Julian* (*b*) the plaintiff being a merchant at *Amsterdam*, and the defendent residing in *London*, indebted to him in a large sum of money, the plaintiff made oath of his debt before a Burgomaster in *Holland*, who certified an account thereof to the plaintiff's agent here, who made an affidavit that he believed the said oath and account-current to be true, and thereupon sued out a writ and held the defendant to special bail; but the Court held this insufficient, on a variety of authorities, and therefore discharged the defendant on common bail. The affidavit in the present case was not such a positive affidavit of the plaintiff's cause of action which the statute 12 *Geo.* 1. *c.* 29 required, and therefore on the authority of this act, as well as on the cases above referred to, this affidavit was insufficient to hold the defendant to special bail. As to the second point, it appeared that the affidavit was not entitled in any Court, but at the foot of it purported to be "Sworn at the Filacer's Office, Pump Court, Temple, this 9th day of *December* 1818, before *John Yates*, deputy Filacer." This, it was contended, was irregular, according to several authorities.(*c*) It was also submitted, that as it was

(*a*) 2 *Stra.* 1226. (*b*) 1 *Wils.* 231.

(*c*) *Morley* v. *Pollard*, 3 *M.* & *S.* 157. 13 *East.* 183. 1 *Bos.* & *Pul.* 271. and *Tidd* 6th ed. 183.

1819.

BLAND *against* DRAKE.

positively sworn that the plaintiff himself was a convicted felon, he could not, according to the recent decision in *Bullock's* case, sustain the action, nor was he competent to swear to the debt, *Tidd's Prac.* 6 *ed.* 181, note *d*, and that as the agent who swore to the debt must derive his information from such party, the rule referred to was applicable to this case; and though in general a contradictory affidavit cannot be received, it is otherwise where the affidavit to hold to bail has been made by a person convicted of felony.—*Tidd's Prac.* 6 *ed.* 196.

BEST J. before whom this motion was first made, said, The case of *Van Morsell* v. *Julian* can hardly be considered as an authority at this time of day, for if that case be law, merchants abroad would be in a dreadful situation. I think I may positively say that that case is now of no authority. I should be glad to know, if this affidavit is not sufficient, how can a better affidavit be framed by a person residing here as the agent of another abroad. I think that if an agent in *England* swears that he believes the debt to be due, that is the highest evidence you can have of the existence of the debt. I think the deponent in this case swears as positively as under the circumstances of the case he can swear, and I think it would be a mischievous doctrine to lay down that such an affidavit is not sufficient. The other cases which have been cited I do not think help the case at all. With respect to the *second* objection, I understand that that was taken before my Brother *Bayley* at chambers, and that he was of opinion that it was not tenable, because the Court will take judicial notice of the Filacer as one of its officers. The case of *The King* v. *Hare*, (*a*) seems to give some colour to the objection; but I will mention the case to my Brother

(*a*) 13 *East.* 189.

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Bayley, and if he thinks there is any thing in it, the defendant will have the benefit of it. As to the other objection, I think there is no weight in it. The affidavit was not made by the supposed felon, but by a party competent to swear, and who had sworn positively, and therefore the contradictory affidavit could be received. But if the defendant had any defence on the ground alluded to, he must plead it.

Chitty now mentioned the case again, and submitted that the 12 *Geo.* 1. c. 29, requires a positive affidavit of the debt, and admitting that an agent of a party abroad may swear to belief, yet before the defendant can be held to bail on such affidavit, a Judge's order must be obtained; and in addition to the authorities already referred to, he cited a manuscript case of *Allen* v. *Barry*, (a) argued by *Tindal* for the plain-

(a) *Michaelmas* Term 1815, MS. of a gentleman at the bar. The affidavit in that case was sworn 11 *July* 1815, at the Bill of *Middlesex* office, and "the deponent *W. R.* of &c. swore that he had lately received from his correspondent *J. D.* of *Philadelphia* in *America*, a letter dated the 22d of *May* last, inclosing two promissory notes, one of them bearing date, &c. whereby *E. B.* promised to pay twelve months after date to the order of *F. C. S.* 6500 dollars 87 cents, which bill appears to be indorsed by the said *F. C. S.*; and the other of the said notes bearing date, &c. whereby the said *E. B.* promised to pay twelve months after date to the order of the same *F. C. S.* 1266 dollars and 79 cents. And this deponent saith that the said letter contained an affidavit purporting to be sworn by the said *J. A.* at *Philadelphia* on the 22d of *May* 1815, whereby the said *J. A.* on his oath said that the said *E. B.* was indebted to him in the sum of 9503 dollars and 37 cents, including a calculation of interest up to the 20th day of *June* then next and now past; and which sum appears to have been calculated as being due upon the said notes. And this deponent saith he believeth the sum of 9503 dollars is of the value of 2300*l.* and upwards, sterling money of *England*. *And this deponent believes that the said E. B. is justly and truly indebted to the said J. A. in the sum of 2300l. sterling, for principal and interest upon the said notes.* And this deponent saith that the said *E. B.* hath not tendered or offered to pay to this deponent the said sum of 2300*l.* in any note or notes of the Governor and Company of the Bank of *England*, and he believes the said *E. B.* hath not offered to pay the same in any such note or notes to any other person or persons. (Signed) *W. R.*" *Barnewell* and *Spankey* moved to make a rule absolute, on the ground that this affidavit of debt without a Judge's order was

tiff, *Barnewell* and *Spankey* for the defendant, where the defendant was discharged by *Dampier* J. upon a similar affidavit, on the ground that no Judge's order had been obtained. He submitted that the words "as this deponent verily believes," applied to the whole of the antecedent part of the affidavit, inasmuch as it would be unnecessary to qualify the swearing to the judgment being in force and unsatisfied, if the deponent meant in the first part of the affidavit to swear positively that the defendant was *still* indebted. The words, as to belief, must therefore be construed to qualify the whole affidavit, which was consequently defective.

ABBOTT C. J. There is no doubt that such an affidavit as that in the case referred to of *Allen* v. *Barry*, without a Judge's order would not be sufficient; but the affidavit in this case is perfectly different from the one in the case referred to, because here there is a positive averment that the defendant is justly and truly indebted to the plaintiff, on a judgment recovered in the Colony of *New South Wales*. The words "which judgment remains in force unpaid and unsatisfied," form a new sentence, which is not connected with the previous positive averment that the money is due. I think there is nothing in the objection, because it is impossible for the deponent to swear in any other manner. The cases referred to in *Wilson* and *Strange* are not to be considered as authorities upon this point.

HOLROYD J. Swearing to belief merely will not do; but here it is sworn in positive terms that the debt

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insufficient, and cited the above case in *Wilson* & *Strange*. After hearing *Tindal* contra, Mr. *J. Dampier* said "This affidavit upon a production of the documents referred to might have been sufficient to have induced a Judge to make an order for holding the defendant to bail. *Imley* v. *Ellefsen*, 2 *East*. 457. But clearly without such an order the proceeding was irregular, and therefore the rule must be made absolute."

1819.

BLAND *against* DRAKE.

is subsisting. The party takes upon himself positively to swear that the money is still due.

BEST J. said, that since the case was before him, he had looked into the authorities in order to satisfy himself that his opinion was well founded, and he had seen the cases of *Munroe* v. *Spinks*, *(a)* and *Cresswell* v. *Lovel* (*b*), which were decisive authorities upon the subject.

Chitty did not press the other point, as he understood it had been overruled at chambers.

Rule refused.

(*a*) 8 *T. R.* 284.

(*b*) 8 *T. R.* 418. In this case the Court said, that though affidavits to hold to bail must in general be positive, yet the Courts, from the necessity of the thing, have relaxed the rule in the instances of assignees of bankrupts and executors, who are only required to swear to the best of their belief. The Court however did not say that those exceptions were the *ne plus ultra*, but, being founded upon principle, other cases standing in *pari ratione*, and requiring the same relaxation of the general rule, must be governed by the same principle.

Tuesday, Feb. 9th.

READ *against* FORE.

Court will not grant a rule that service of attachment on defendant's attorney shall be sufficient, although it be sworn that repeated attempts have been made to serve defendant personally with a copy of the award, but he was not to be found; and although it is suggested that defendant keeps out of the way to avoid being served. (*a*)

COMYN moved for a rule to shew cause why the service of an attachment against the defendant, for not performing an award, might not be deemed good ser-

(*a*) *Blander* v. *Penleage*, 5 *Taunt.* 813. The Court will not infer that an award has come to the actual possession of a party, in order to ground an attachment. *Per Curiam.* Since there is no evidence of an acknowledgment by the defendant that the award had come to his hands, we cannot even from these strong facts infer it for the purpose of placing him in contempt.—And in order to support an attachment, plaintiff must shew that he has demanded what was due to him, and if he has demanded more than was

READ *against* FORE.

vice by serving it upon the defendant's attorney. He produced an affidavit, from which it appeared that repeated attempts had been made personally to serve the defendant with a copy of the award, but that he was never to be found at his house; and therefore it was insisted, that there was strong reason to believe the defendant kept out of the way for the purpose of avoiding service, in order to throw the plaintiff over the Term; but the affidavit did not set forth sufficient matter to establish that fact; and therefore

The COURT said, it would be a dangerous precedent to establish in cases of attachment, if this rule were to be granted upon such an affidavit.

Rule refused.

due, he cannot have an attachment for non-compliance. *Strutt* v. *Rogers*, 7 *Taunt.* 219; 2 *Marsh*, 524; *Tidd*, 6th ed. 881; *Imp. K. B.* 8th ed. 742, 3.

MUNROE *against* HOWE.

Tuesday, Feb. 9th.

An omission in the *ac etiam* part of the bill of *Middlesex*, of the cause of action for which the defendant is arrested on bailable process is irregular, and he cannot be holden to special bail thereon.(a)

PLATT, on a former day, obtained a rule, calling upon the plaintiff to shew cause why the bail bond in this case should not be delivered up to be cancelled, and why the defendant should not be discharged on common bail instead of special bail, on an objection to the *ac etiam* part of the bill of *Middlesex*, on which the defendant had been arrested, inasmuch as it did not set forth the true cause of action in pursuance of 13 *Car.* 2. st. 2. c. 2. The defendant was arrested on a bill of

(a) In making the arrest, the *ac etiam* part of the writ is to be regarded, and if the writ begin as against two defendants, and the *ac etiam* be only against one, that one only can be arrested, and the plaintiff may declare against him alone. *Kervall* v. *Jossett* and another, 7 *Taunt.* 458.

1819.

MUNROE *against* HOWE.

Middlesex for the sum of 300*l.* the amount of a bill of exchange of which he was acceptor, but the bill simply stated the sum of 300*l.* without going on to state that the money was due on promises; and he relied upon the express words of the above-mentioned statute, which provides that no person arrested upon any bailable process, wherein the true cause of action was not particularly expressed, should be compelled to give security for his appearance in any sum exceeding 40*l.* In consequence of this act, and in order to preserve the jurisdiction of civil causes to B. R. to the same extent as before, the *ac etiam* clause was invented, in which the true cause of action is expressed, in addition to the general complaint of trespass, which gives the Court jurisdiction. Much of the practice of the Court depended upon positive rules rather than on general reasoning. If this rule were not to obtain, the whole of the *ac etiam* clause might be omitted in the bill. It ought, however, to appear on the face of the bill itself, whether or not it be bailable process. The indorsement was only to ascertain the amount, and had reference to the contents of the bill. He referred to *Davison* v. *Frost* (*a*) in

(*a*) 2 *East* 305. In that case an omission in the *ac etiam* part of the writ of the sum for which the defendant was arrested was held irregular, and the defendant was discharged on filing common bail. By rule Hil. 2 *Geo.* 2, it was ordered, that where any defendant shall be arrested by virtue of any process issuing out of this Court, in which the cause of action shall be specially specified and expressed, or a copy of such process shall be delivered to any defendant according to the form of the statute in such case lately made and provided, and the plaintiff thereupon shall declare, the defendant in such case shall not have liberty of imparling without leave of the Court in that behalf first granted, but shall plead thereunto within the time allowed by the course of the Court to defendants sued by original writ, and for want thereof judgment may be entered against such defendant by default. In the same Term, 1728, a notice was stuck up in the K. B. office, that all clerks and attornies that intend to proceed according to the above rule, are to take notice that in suing out such writs they do not insert in the *ac etiam* the whole declaration at length, but only describe the cause of action shortly, according to the specimen hereunder set forth, varying the same as the nature of the action shall require, viz. in an action for goods sold—" Of a plea of trespass,

support of the objection, at the foot of which case a summary form was given (*a*).

1819.

MUNROE *against* HOWE.

Adolphus shewed cause against the rule, and submitted that the bill of *Middlesex* contained sufficient certainty in the *ac etiam* clause, according to the 13 *Car.* 2. st. 2. c. 2. He admitted the authority of the case *Davison* v. *Frost*, and certainly the question was, whether the Court would be concluded by the decision in that case.

ABBOTT C. J. I think that case a decisive authority, and for any thing that appears, this may be a bill of trespass, and not upon promises. It is quite clear that the particular cause of action must be expressed in the *ac etiam* clause.

Rule absolute.

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and also to a bill of the said Q. against the aforesaid D. for fifty pounds for divers goods, wares and merchandizes sold and delivered to the said D. by the aforesaid Q. according to the custom," &c. And the notice gives other forms for money laid out, money lent and received, and in debt, covenant, assault, and on a note of hand. Rules and Orders, *K B. Hil.* 2 *Geo.* 2.

(*a*) *Id. ibid.* By stat. 5 *G.* 2. c. 27. sec. 5. it is enacted, that no special writ, nor process specially expressing the cause of action, shall issue unless the cause of action amount to 10*l.* (extended to 15*l.* by 51 *Geo.* 3. c. 124. sec. 1.)

1819.

Tuesday, Feb. 9th.

HODSON *against* GARRETT.

Where the plaintiff took an assignment of the bail bond, and afterwards gave notice of exception to the bail without entering it; *Held* that plaintiff's irregularity in not entering an exception was not waived by defendant's having given two notices of justification, under one of which the bail justified, and therefore held that proceedings should be stayed, but the bail bond was not to be delivered up to be cancelled. (*a*)

CURWOOD on a former day obtained a rule calling on the plaintiff to shew cause why the bail bond in this case should not be delivered up to be cancelled, with costs, to be taxed by the Master; and why all further proceedings should not be stayed on the ground of irregularity.

Chitty now shewed cause against the rule, and contended, 1st, That there was no irregularity in the proceedings; and, 2nd, Supposing them to be irregular, the rule moved for was too large in its terms. The facts were these: the plaintiff had taken an assignment of the bail bond, but he had not entered an exception to the bail. Two notices of justification had been served, under one of which the bail justified; but the defendant had not afterwards served the plaintiff with a rule for the allowance of bail. The irregularity therefore complained of was, that the plaintiff had not previously entered an exception to the bail; but it was now contended that it was too late under these circumstances for the defendant to take advantage of this objection, in not having entered the exception. It was admitted on both sides that the defendant had had notice of the exception, though it had not been entered; but inasmuch as the defendant had acted upon the notice, though not actually entered, he was not at liberty now to take advantage of the objection. In all events his rule was too large, because even though the

(*a*) In C. P. notice of justification of bail is a waiver as between the parties of a neglect to give *notice of exception*, though it is not a waiver with respect to the sheriff so as to support a rule to bring in the body. *Cohen* v. *Davis*, 1 *H. Bla.* 80. *Rogers* v. *Maplebach*, 1 *H. Bla.* 106.

1819.

HODSON *against* GARRETT.

objection was valid, the bail bond on that ground could not be delivered up to be cancelled. The utmost that could be gained by this rule was a stay of proceedings.

ABBOTT C. J. There is no doubt that the exception ought to be entered according to the practice of the Court, and I do not think the defendant waives his objection by having acted upon the notice merely, and therefore I think the proceedings irregular. There is something which the plaintiff ought to have done, which he has not done. At the same time, however, I think the defendant's rule is too large in calling upon the Court to set aside the bail bond. That part of the rule which relates to the stay of proceedings must be made absolute, but as to the other it must be discharged.

Rule absolute accordingly.

LANE *against* SEWELL.

Wednesday, Feb. 10th.

The sheriff will not be allowed extra expenses of summoning special jurors on account of their residing at a distance from each other; and Court will make a rule absolute for the sheriff to refund money received on this account, although he has actually expended all the money. (a)

WILDE moved to make a rule absolute, calling upon the sheriff of *Cornwall* to refund 4*l*. 8*s*. and to pay the costs of the application. It appeared that the under-sheriff, upon receiving a special jury process, had received eight guineas as his fee for executing it. The Master, upon the subsequent taxation of the costs, had allowed only 3*l*. for the sheriff's fee. Two applications had been made to refund the difference, before the present application.

(a) Vide *Pearson* v. *Maynard*, 1 *Taunt*. 416. where the Court refused to allow the expenses of sheriff of *Yorkshire* in summoning knights to appear at *Westminster* in a real action. The sheriff cannot maintain an action for expenses in keeping possession of goods under *fi. fa.* at request of plaintiff. *Bilke* v. *Havelock*, 3 *Campb*. 374. 2 *M.* & *S.* 294. And see *Imp. K. B.* 8th ed. 378. as to fees on special jury.

1819.

LANE *against* SEWELL.

Raine shewed cause upon an affidavit, stating, that the sheriff, upon account of the distance the jurors resided from each other, had been under the necessity of issuing summonses to seven different bailiffs, to each of whom he had been obliged to pay sums that left him nothing for himself, and prayed that it might be referred to the Master, to see if the sum taken was unreasonable.

The COURT conferred with the Master, and stated, that the Master did not allow a fee with reference to the trouble in each particular case, but upon a general average; and as the course proposed would lead to additional trouble and expense in every case, it could not be granted. With regard to the statement, that the expenses to which the sheriff had been put, left him no remuneration for himself, the Court said it was not necessary he should have any, that summoning the jury was part of his general duty as sheriff. The *rule* was therefore made *absolute* with costs.

Wednesday, Feb. 10th.

CRADOCK *against* DAVIS.

The Court will not discharge a rule for special jury where there is sufficient reason to believe that it is material to the defendant to have his case tried by a special jury. (a)

CHITTY on a former day obtained a rule calling on the plaintiff to shew cause why the rule for a special jury in this case should not be discharged on an affidavit, stating that the action was brought for goods sold and delivered, after indulgence given, for which a bill of

(a) In *C. P.* the Court will not discharge a rule for a special jury, where it has been regularly obtained, but where delay is suggested as the motive for obtaining the special jury, and not satisfactorily denied, the cause will be directed to be tried at the sittings in Term, unless such terms are offered as will obviate the objection. *Bloxam* v. *Brown*, 4 *Taunt* 470; *Tidd*, 6 ed. 841. The application to try the cause at the sittings in Term must be made to the judge at Nisi Prius. *Johnson* v. *Coke* and Gas Light Company, 7 *Taunt.* 390.

exchange had been taken, and therefore it was contended that this was not a case which need be tried by a special jury.

1819.

CRADOCK *against* DAVIS.

Wilde shewed cause against the rule, and urged that as the bill of exchange had been given under very peculiar circumstances, it might furnish the defendant with a very just ground of defence; and as it was sworn to be material to him to have the case tried by a special jury, the Court would not deprive him of the advantage of having his cause tried in that manner.

Chitty in support of his rule said, that as the bill of exchange had been given in payment of the goods for the price of which this action was brought, it was decisive evidence that the defendant had promised to pay; and therefore it could not be said that this was a fit case to be tried by a special jury.

The COURT said that there might be circumstances, subsequent to the drawing of the bill, material to the defendant in the present action, and from what had been stated there seemed to be no reasonable ground for depriving the defendant of the advantage which he sought in having his case tried by a special jury.

Rule discharged.

1819.

Wednesday, Feb. 10th.

CHAPMAN *against* DRUNNING.

The present defendant obtained a judgment against the plaintiff in C. B. for 12*l.* the latter having suffered judgment to go by default, although he had a claim against the defendant for 10*l.* which he neglected to set off in that action. He now brought an action in K. B. to recover that demand, and the Court held that as the defendant had offered to allow the plaintiff the 10*l.* he might obtain a rule for judgment as in case of a nonsuit, unless the plaintiff would either give a peremptory undertaking to try at the next sittings, or discontinue the action and pay costs. (*a*)

A RULE *nisi* having been obtained in this case for judgment as in case of a nonsuit,

Gurney now shewed cause, and suggested, that the defendant in this case had brought an action against the plaintiff in C. B. where he recovered a verdict and obtained judgment for 12*l.* and costs. It appeared that he was himself indebted to the plaintiff in the sum of 10*l.* but no set-off had been pleaded in that action. The plaintiff in the present action had tendered the debt and costs upon that judgment, no credit being given to him for the 10*l.* which the present defendant owed him, and his clerk gave a receipt for the money. The present action was therefore brought to recover the 10*l.* which had been disallowed on settling the other case. The affidavit now offered in shewing cause stated, that the defendant's attorney had told the plaintiff's attor-

(*a*) Where a defendant has a set-off against the plaintiff, and does not appear at the trial, the plaintiff may either take a verdict for the whole sum he proves due, subject to be reduced to the sum due on the balance of accounts, if the defendant will afterwards enter into a rule to bring no action for the set-off, or he may take a verdict for the smaller sum, with a special indorsement on the postea, as a foundation for the Court to stay proceedings, if another action should be brought for the amount of the set-off, *Laing* v. *Chatham*, 1 *Campb.* 252. The practice of giving judgment as in case of a nonsuit, is regulated by the 14 *Geo.* 2. c. 17. which enacts, that where any issue is joined in any action, and the plaintiff neglect to bring the issue on to be tried according to the course and practice of the Court, it shall be lawful for the Judge or Judges of the Courts respectively, at any time after such neglect, upon motion made in open Court after notice, to give the like judgment for the defendant in such action as in cases of nonsuit, unless the Judge or Judges shall upon just reasonable terms allow any further time for the trial of such issue. See the decisions upon the act, *Tidd*, 6th ed. 820, 1, &c.

1819.

Chapman *against* Drunning.

ney after he had received the debt and costs in the former case, that he had deceived his clerk by inducing him to take a receipt for the debt and costs without deducting the 10*l.* and that he might proceed with the present action at his peril, for he would move for judgment as in case of a nonsuit. Under these circumstances he submitted that this rule must be discharged with costs.

Chitty, contrà, urged, that as the plaintiff had neglected to plead the set-off in the Court of Common Pleas, and had suffered judgment to go by default, he was not now at liberty to bring the present action to recover the 10*l.* which he might have claimed on the adjustment of the first action. The affidavits on the part of the defendant positively swore that the defendant was always ready and willing to allow the plaintiff the 10*l.* in account.

Bayley J. It appears to me, that if the plaintiff in this action had pleaded a set-off to the defendant's action in the Common Pleas, he would have had no cause of action at the time he commenced these proceedings. The plaintiff therefore was wrong originally, for had he pleaded a set-off the defendant must in all events have had a verdict for the balance. By bringing his action afterwards, having missed the opportunity of getting his demand allowed, he is entitled to no indulgence. Upon the plaintiff's own shewing, there is nothing in this case to be tried, and therefore he should either give a peremptory undertaking to try at the sittings after the present Term, or discontinue the action upon payment of costs. The *rule* was discharged upon the latter alternative.

1819.

Wednesday, Feb. 10th.

In Michaelmas Term the Court ordered an attachment against the sheriff to stand as a security for the debt and costs in the cause, the sheriff having had regular notice of the attachment. In this Term he applied to discharge that part of the rule as to the attachment standing as a security, urging that he was no party to the rule; but the Court held the application too late. (*a*)

LEE *against* CARY.

LAST Term it was ordered, that the attachment which issued against the sheriff in this cause should stand as a security for the debt and costs; it appearing on that occasion that the plaintiff had lost a trial in consequence of the defendant's irregularity. On a former day in this Term, *Holt* obtained a rule, calling on the plaintiff to shew cause why so much of the rule above mentioned as related to the attachment standing as a security should not be discharged, the application having been made at the instance of the sheriff.

Reader now shewed cause, and objected that the application was too late, inasmuch as it was the duty of the sheriff to have appeared last Term, when the Court ordered the attachment to stand as a security. This had been a regular attachment; and in last Term *Espinasse* appeared of counsel for the defendant, and the Court on that occasion decided, that as the plaintiff had lost a trial, it was but reasonable that the attachment should stand as a security for debt and costs. If the sheriff had any objection to urge to this proceeding, it was his duty to have applied to the Court in that Term to set aside the attachment. The sheriff could not now call upon the Court to re-argue the question as to the irregularity of the attachment. There was no pretence for saying that he was taken by surprise by the course which the proceedings took last Term, be-

(*a*) When a trial has been lost, the Court will not set aside an attachment obtained against the sheriff, but direct it to remain in the office and stand as a security to the plaintiff for the sum recovered. *Gravet* & *Williams*, 4 *T. R.* 352. *Tidd*, 6th ed. 307. It is incumbent on the plaintiff to shew by affidavit in what manner the trial has been lost, by proving the date of the delivery of the declaration, &c. *The King* v. The Sheriff of *Surry*, 5 *Taunt.* 606.

cause it was distinctly sworn upon the affidavits, that when the attachment was served the officer who made the present application was present in the sheriff's office, and he was told that the sheriff was attached. Under these circumstances the sheriff came too late, and therefore the rule must be discharged.

Holt, in support of the rule, urged, that as the sheriff was no party to the rule made in last Term, he could not be bound by it, and therefore he was at liberty now to come and set that part of it aside which affected his security.

ABBOTT C. J. I know of no instance of a rule being opened in this way. When the case was before the Court in last Term, there was nothing to shew that the attachment was irregular. It appears that the sheriff had had regular notice of the attachment, and therefore if he had any thing to urge against it, he ought to have come to the Court as soon as possible.

BAYLEY J. The attachment was granted on the 18th of *November*, and the sheriff does not apply to set it aside until this Term, and that is clearly too late. It is not suggested that the former application to the Court was made without his privity or consent—he does not swear that he did not know of any such application being made. Under these circumstances, the Court cannot now grant him any relief.

HOLROYD J. and BEST J. concurred.

Rule discharged with Costs.

1819.

Wednesday, Feb. 10th.

ABRAHAM *against* COATES.

Where a second application is made to put off a trial, the Court will not compel the defendant to pay the money into Court or give security. (*a*)

F. *POLLOCK* shewed cause against a rule obtained by *Barnewall* to put off the trial of this cause, and contended that as this was a second application (which was admitted) the defendant ought to pay the money into Court, or give security.

BAYLEY J. referred to the Master, and decided that by the practice the plaintiff was not entitled to the terms he asked for; and

The *rule* was made *absolute.*

(*a*) As to the causes and manner of putting off a trial, see *Tidd*, 6th ed. 826—9.

Wednesday, Feb. 10th.

VINCENT Gent. *against* GROOME.

Sham pleas tendering issues which required different modes of trial, and pleaded so as to entrap the plaintiff, set aside with costs to be paid by the attorney, though he was expressly instructed by the defendant to plead a dilatory plea.

DECLARATION on *assumpsit.* Plea *non assumpsit* to the second and subsequent counts, concluding to the country. Plea to the first count of a set-off on a recognizance alleged to have been acknowledged by the plaintiff to the defendant in the Court of Common Pleas, with a *prout patet* of a record in *this* Court.

Chitty on a former day obtained a rule for the defendant and his attorney to shew cause why the plaintiff should not be at liberty to sign interlocutory judgment as for want of a plea, and why the defendant or his attorney should not pay the costs of the application. He now contended, upon the authority of the cases of

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VINCENT *against* GROOME.

Thomas v. *Vandermorlen*, 2 *Bar.* and *Ald.* 197. *Bentley* v. *Goodlake*, id. 199. that this sham plea was pleaded contrary to the practice of the Court; that it not only occasioned two issues, the one to be tried by a jury, and the other by the record, but was so framed as to endeavour to entrap the plaintiff by averring the existence of the record in this Court, when it was previously alleged that it was a recognizance acknowledged in the Court of Common Pleas.

D. Pollock shewed cause, and admitted that the plea could not be supported, but produced an affidavit of the defendant, which stated that his attorney had on former occasions pleaded dilatory pleas for him, and that he desired him to adopt the same course in the present action. It was contended, therefore, that the attorney having framed the plea according to his client's instructions, he ought not to be made personally liable for the costs, and so much of the rule as related to him ought to be discharged. But

The COURT said, this is a very improper plea, and the attorney ought to pay the costs.

Rule absolute.

WILLIS *against* OSBORNE.

Wednesday, Feb. 10th.

Where a cause has been referred to arbitration, and the costs are directed to abide the event, that must be taken to mean the legal event; and, therefore, where the arbitrator found no damages for the plaintiff in an action of trespass to land, and directed both parties to pay their own costs, it was held that the plaintiff was entitled to no costs, because the legal event of the reference would not carry costs. (a)

ESPINASSE on a former day obtained a rule calling upon the defendant to shew cause why so much of the award made in this cause, which related to the costs

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(a) *Ward* v. *Mallander*, 5 *East*. 489. where a verdict is taken for 10*l.* in trespass subject to an award of damages, and the costs to abide the event, if

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Willis *against* Osborne.

of the action between the parties should not be set aside. It appeared that the action was in trespass, for entering the close of the plaintiff, but the parties agreed to refer the cause to arbitration, and by the terms of the submission it was directed that the costs should abide the event. The arbitrator had awarded, that the defendant had trespassed on the plaintiff's land, and had directed the defendant to pull down a chimney he had erected thereon; but he had not awarded any damages to the plaintiff, inasmuch as it appeared that each party had been respectively trespassing on the other's premises, and had directed each party to pay their own costs, and that each should pay a moiety of the costs of the award. Under these circumstances, it was contended that as the costs were to abide the legal event of the arbitration, the plaintiff was entitled to the costs of the cause, notwithstanding this award.

Chitty now shewed cause against the rule, and said that as this was a reference of all matters in difference between the parties, it was competent for the arbitrator to direct how the costs should be paid. The costs were not to be regulated by the event of the particular cause, but by the result of the inquiry into all the matters in dispute between the parties. The arbitrator had in fact decided nothing in favour of the plaintiff, and therefore as he was entitled to no damages, he was entitled to no costs. He referred to *Swinglehurst* v. *Altham* (*a*) as decisive of this case.

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the arbitrator find less than 40s. damages the plaintiff cannot have his costs, though it be also found that the trespass was wilful, and that the defendant should pay the plaintiff his costs, for, costs being directed to abide the event, means the legal event, and the authority of a Judge to certify for costs where the trespass is wilful (see 8 & 9 *W.* 3. *c.* 11. *s.* 4.) is not transferred to the arbitrator under such a rule of reference.

(*a*) 3 *T. R.* 138.

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WILLIS *against* OSBORNE.

Espinasse in support of the rule said, that where parties enter into arbitration bonds, the arbitrator cannot go beyond the power given him. The costs in this case were to abide the legal event, and therefore the arbitrator had no right to ingraft any adjudication of his own upon the subject of costs. An arbitrator may award costs without any express authority for that purpose, but still he cannot interfere with the legal event of the cause. (*a*)

The COURT said that there was no doubt about the principle applicable to these cases, but the question was, whether this case came within the principle? Here the plaintiff would not be entitled to costs according to the legal event, unless there were 40*s*. damages, because this was not a trespass where the freehold came in question. Suppose this was a decision at *nisi prius*, the plaintiff could not recover costs unless there was a certificate of the Judge; but an award does not amount to a certificate. The only objection to this award seemed to be, that the arbitrator had used words which were not necessary. He need not have said any thing about costs, because, as he had awarded no damages, the plaintiff would be entitled to no costs. The arbitrator had found that a trespass had been committed, but unless he awarded damages to the amount of 40*s*. the consequence of the legal event contended for here could not follow.

Rule discharged.

(*a*) *Roe* ex dem. *Wood* v. *Doe*, 2 *T. R.* 644.

1819.

Wednesday, Feb. 10th.

WADWORTH *against* ALLEN.

Plaintiff's attorney compelled to refund the costs of a bill of Middlesex, it appearing that no precipe or warrant to prosecute was filed in the office; and also attached for not answering the matters of the affidavit relating thereto. (*a*)

ADOLPHUS on a former day obtained a rule, calling on the plaintiff's attorney to shew cause why he should not refund the costs of the bill of *Middlesex* issued in this cause, and why he should not answer the matters of the affidavit, and pay the costs of this application. The affidavit of the defendant stated, that in *February* 1817 he was served with the copy of a bill of *Middlesex*, at the suit of the plaintiff, that he had paid costs upon it to the amount of 2*l.* 8*s.* that in *November* last he searched at the Bill of *Middlesex* Office, and found that there was no precipe or warrant to prosecute filed.

Barrow now shewed cause, and stated that the writ had been issued by a clerk of the plaintiff's attorney, and he contended that it was regularly issued, as appeared by the writ annexed to his affidavit.

Adolphus, in support of the rule, urged that it was impossible for a precipe to have issued without being able to find some traces of it in the office. The writ itself now produced bore upon the face of it the appearance of fabrication, and the fact of no trace of it being to be found in the office, was a strong confirmation of the suspicion.

The COURT having inspected the writ, ordered the rule to be made absolute, and directed an attachment to issue against the plaintiff's attorney, for not answering the matters of the affidavit.

Rule absolute.

(*a*) See *Tidd*, 6th ed. 158; and see the Forms of Præcipes, *Tidd's A* 4th ed. 75. *Imp. K B.* 8th ed. 150, 1.

1819.

Wednesday, Feb. 10th.

COOPER *against* JOHNSON.

Where a cause is referred by order of nisi prius, to arbitration, the death of one of the parties at any time before the award made is a revocation of the arbitrator's authority, and the Court will set aside an award made subsequently to such death. (*a*)

ADAM on a former day moved to set aside the award in this case, on the ground that the authority of the arbitrator was countermanded by the death of one of the parties before the award was published. By an order of *nisi prius* at the sittings at *Westminster* Hall on the 22d of *June* last, all matters in difference between the parties were referred to an arbitrator. Before the latter made his award the plaintiff died, but notwithstanding this the executors were entitled to enter up judgment on the authority of stat. 17 *Car.* 2. *c.* 8. (*b*)

Gurney now shewed cause against the rule, and cited *Potts* v. *Ward* (*c*) as a decisive authority against this application, because there it was expressly held that the death of one of the parties is a revocation of the arbitrator's authority.

Adam in support of his rule cited *Turner* v. *Cowper* (*d*) in aid of the principle he contended for. There a rule was taken by consent to refer it to the Prothonotary to inquire into the quantum of the debt and the value of the goods levied, and before the Prothonotary made

(*a*) Vide *Toussaint* v. *Hartop*, 1 *Moore*, 287, where a verdict was taken for the plaintiff by consent, subject to the award of an arbitrator, such reference being authorized by an order of *nisi prius*, and the defendant died after the verdict, but before the award, and the arbitrator after such death made his award, ordering a verdict to be entered for the defendant; it was held that the award was bad, as the death of the defendant was a revocation of the arbitrator's authority. But see *Bower* v. *Taylor*, *E. T.* 56 *Geo.* 3. cited in *Caldwell* on Arbitrations, p. 30.

(*b*) By that statute it is enacted, "that the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two Terms after such verdict."

(*c*) 1st *Mars.* 366. (*d*) *Barnes*, 210.

1819.

Cooper *against* Johnson.

his report the plaintiff died; his executor, on his application to stand in the plaintiff's place, was made a party to the rule, and the Prothonotary was directed to proceed without the consent of the defendant to this rule.

The Court however said that the judgment of the Court of Common Pleas in the case of *Potts* v. *Ward* must govern their decision. There it was distinctly held that the death of one of the parties is a revocation of the arbitrator's authority. It would be well that in future the orders of reference at *nisi prius* should contain a clause so as to make the award binding notwithstanding the death of one of the parties. This would prevent a great deal of inconvenience to the parties, and would prevent the repetition of motions of this kind.

Rule discharged.

Saturday, Feb. 10th.

Bernard *against* Winnington.

Where an attorney took out his certificate on the 25th of *November*, was arrested in the beginning of *January*, put in bail above, and did not apply to the Court to avail himself of his privilege until the 3d of *February*; *Held* that the application was too late. (*a*)

Reader on a former day obtained a rule calling on the plaintiff to shew cause why the defendant should not be discharged out of custody, and why the bail-bond should not be delivered up to be cancelled,

(*a*) If an attorney or other officer of the Court be arrested, he may in general move to be discharged on common bail, *Redman's* Case, 1 *Mod.* 10; 2 *Keb.* 555; 2 *Salk.* 544; 1 *Wils.* 298, *Wheeler's* Case. An attorney or officer of a different Court was formerly obliged to find special bail, and plead his privilege in abatement, *Snee* v. *Humphreys*, 1 *Wils.* 306, 2 *Salk.* 544, 2 *Stra.* 864, 2 *Lord Raym.* 1567, sc. This distinction however seems to be now abolished, and in a late case where an attorney of the Court of Common Pleas was arrested on an attachment of privilege, at the suit of an attorney of the King's Bench, that Court ordered the bail-bond to be delivered up to be cancelled on his entering a common appearance. *Beck* v. *Lewin*, *Tid* 6th ed. Add. 1231, & see id. 203.

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BERNARD *against* WINNINGTON.

and why all further proceedings should not be stayed without costs. The affidavit upon which this motion was made, stated that the defendant was an attorney of the Court, having taken out his certificate on the 25th of *November* last, since which time he had been practising as an attorney. He was arrested in the early part of *January*, and he did not make this application until the 3d of *February*.

Chitty now shewed cause against the rule, and contended, 1st, That this application was too late, because the defendant had put in bail above, which was a waiver of the irregularity; and 2dly, That as it appeared to be distinctly sworn that the plaintiff had not the slightest reason to believe that the defendant was an attorney at the time he was arrested, it would be a sufficient answer to the application.

The COURT said that the motion was clearly out of time, having been made after bail above had been put in, and not until the 3d instant; and therefore on that ground the rule must be discharged.

Rule discharged.

1819.

Wednesday, Feb. 10th.

ARMSTRONG *against* FULLER.

Judgment signed and execution taken out for costs in an action on judgment without leave of a Court or Judge under the 43 G.3. c.46. s.4. held irregular; but where recognizances of bail were taken in C. P. and bail were sued in that Court to judgment, and having no property, actions were brought on the judgment in K. B. in order to take their persons; costs were allowed by the Court *nunc pro tunc.* (a)

THE plaintiff commenced an action in the Common Pleas against *A. B.* and the defendants became bail above in that action, and after judgment against the principal, the plaintiff proceeded by *scire facias* against the defendants as the bail on their recognizances, and obtained judgment against them by default. He then arrested the defendants in an action of debt in this Court on that judgment against the bail, and in *Michaelmas* Term last obtained judgment on demurrer, and taxed costs without applying to the Court for costs under the 43 *Geo.* 3. c. 46. and in the vacation took the defendants in execution under a *capias ad satisfaciendum* for the debt and costs. The defendant on a former day in this Term moved, on an affidavit stating these circumstances, for a rule *nisi* to set aside the judgment and execution, and that he should be discharged out of custody on the ground of such irregularity in signing judgment for costs without the leave of the Court.

Marryat now shewed cause on an affidavit, stating that by the practice of C. B. bail could not be taken on a *ca. sa.* and that they had in this case sold off nearly all their goods, and that there was rent in arrear in respect of their houses, and therefore the plaintiff brought the action on the judgment in this Court, in order to take the defendants in execution. He contended that this was a case in which the Court would consider that

(a) The Court allowed the costs of an action on a judgment, where the defendant, after judgment was obtained, sued out a writ of error, and then pleaded *nul tiel* record to the action on the judgment. *Garnwell* v. *Barker*, 5 *Taunt.* 264.

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ARMSTRONG *against* FULLER.

the plaintiff ought to be allowed the costs, and would now give them to the plaintiff *nunc pro tunc*, and not disturb the judgment which was signed for costs, to which the plaintiff was in justice entitled.

Chitty, contrà, cited 2 *Taunton* 113, 4. and other authorities collected in *Tidd. 6 ed.* 1155, (*a*) and submitted, that as the plaintiff thought proper to commence his action originally in C. B. he must be taken to be conusant of the practice of that Court, and having elected to proceed in a Court in which the persons of the bail were not liable to be taken, he ought not afterwards to be permitted to resort to this Court and proceed for the costs merely with a view to take the bail in execution. He contended, that in actions against bail no arrest is in general permitted, and that by the old law, the person could not be taken in execution for the breach of any contract, and a recognizance of bail is a contract, and this was one reason why the Court of C. B. do not permit a *ca. sa.* against bail. He also urged that the plaintiff ought not to have arrested the defendant in the action on the judgment, and therefore the proceedings were vexatious, and consequently the rule ought to be made absolute with costs.

Per Curiam. There is no ground for supposing that these defendants have been wilfully oppressed. With respect to the original proceedings in the Common Pleas, nothing could be more natural than that the proceeding should be taken in the Court in which the recognizances of bail were given, and it could not be supposed at that time that there would be any necessity of

(*a*) In C. P. bail cannot be taken on a *capias ad satisfaciendum*, *Wooden* v. *Moxon*, 2 *Marsh.* Rep. 186. 6 *Taunt.* 490. S. C. *Tidd*, 6th ed. 1155.

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ARMSTRONG *against* FULLER.

proceeding against the bodies of the bail, because there was fair reason to think that they had property enough to answer the judgment, but when it was found necessary to obtain judgment so as to issue execution against the bodies in this Court, they had a right to hold the defendants to bail. There is nothing oppressive in that. Here they certainly have taken their judgment for costs, without adopting that step which by the provision of the 43 *G.* 3. *c.* 46. ought to have been adopted, and by that means they have forced the defendants to make the application in question, and therefore the defendants are entitled to the costs of this application. (*a*) But inasmuch as it is most probable that if the Court had been applied to there would be a ground for giving the plaintiff the costs of this proceeding, he may now have the option to reduce the judgment to the sum of 95*l.* which is now claimed, or we will enlarge this rule to give him an opportunity of applying for his costs. Or if in the mean time the 95*l.* is paid, the defendants may be discharged out of custody. In all events the plaintiff must pay the costs of this rule.(*b*)

Marryat then obtained a rule to shew cause why the taxation of costs should not stand, or why the costs of the former proceedings in this Court should not be allowed under the special circumstances of the case.

Chitty on the last day of the Term shewed cause against this rule on an affidavit stating the facts in the foregoing case, and that the bail had nearly sufficient goods to satisfy the judgment, and shewing that the original defendant had without their privity gone abroad, and left them without funds to pay the debt. He submitted that this was therefore not a case in which the

(*a*) *Lee* v. *Lingard*, 1 *East.* 404.

(*b*) These were afterwards taxed and paid to defendant's attorney before the subsequent rule was made absolute.

1819.

ARMSTRONG *against* FULLER.

Court would give costs, and that the Court would not amend or alter the judgment after the Term in which it was signed.

The COURT said, that under the circumstances of the case this rule must be made absolute, but without costs.

Rule absolute without Costs. (*a*)

(*a*) i. e. The defendant's costs of shewing cause against the last rule.

BUCKLE *against* ROACH.

Thursday, Feb. 11th.

Where authority was given to an attorney to protect defendant from arrests, and before the authority was countermanded, the attorney gave an undertaking to put in bail for the defendant, the Court would not set aside the proceedings on behalf of defendant, although he disclaimed the authority of the attorney. (*a*)

CHITTY on a former day obtained a rule to shew cause why the proceedings against the defendant in this action subsequent to the writ, should not be set aside, and why an attorney named *Pears*, who had acted on behalf of the defendant, should not pay the costs of the application. The motion was founded on an affidavit,

(*a*) The Court of C. P. refused to set aside an order of *nisi prius*, referring a cause to arbitration, on an affidavit by the defendant stating that she had expressly desired her attorney not to consent to any rule of reference; and the Court said that granting such applications would lead to collusion, and that the defendant's remedy was by action against her attorney. *Filmer* v *Delber*, 3 *Taunt.* 486 C. P. *Griffiths* v. *Williams*, 1 *T. R.* 711. But it has been held that if a debtor pay the debt to an attorney suing him on behalf of his creditor, and it turns out that the attorney had no authority from the plaintiff, he will be liable to pay the money again, and his only remedy is against the attorney, who will be responsible, although he conceived he was acting under a real authority from the plaintiff, *Robson* v. *Eaton*, 1 *T. R.* 62. From this case therefore it seems to follow, that the Court would stay the proceedings where an action is brought by an attorney without authority, for otherwise the defendant would be twice charged, see *Tidd*, 6th ed. 548. In *Robson* v. *Eaton*, 1 *T. R.* 62. the record of the attorney's being admitted to prosecute was insisted upon as obligatory on the plaintiff; but the Court said that the record only proved that the attorney prosecuted the suit in the plaintiff's name, but not that the plaintiff gave any authority to the attorney for so doing, vide tamen, 6 *Mod.* 16. 1 *Salk.* 86—88, 192.

1819.

BUCKLE against ROACH.

stating that *Pears* had, without the defendant's authority, given an undertaking to put in bail above in the action, and had accordingly put in bail who had regularly justified. The authority of Mr. *Pears* to act for the defendant was denied by the affidavit, and it was shewn that a Mr. *Elworthy* had been employed as his attorney for six months past. It was on this ground that the proceedings were not sustainable.

Gaselee and *E. Lawes* now shewed cause—the former for Mr. *Pears*, and the latter for the plaintiff; and from the affidavits produced, it appeared that the defendant had been in embarrassed circumstances, and had before the present proceedings informed Mr. *Pears* that he expected to have actions commenced against him, and desired him to protect him from arrests, and adopt such measures as he might think necessary for his defence. The affidavits further stated, that Mr. *Pears* had been in the habit of doing business for the defendant.

Chitty, in support of the rule, admitted that the affidavit of Mr. *Pears* was not to be resisted; but urged that as the defendant had positively disclaimed his authority to act for him, and had sworn that during the last six months Mr. *Pears* had acted for him in no instance as his attorney, the Court would not give effect to the proceedings on the bail bond.

Per Curiam. If a party gives a general authority to an attorney to act for him, that authority continues in force until it is countermanded. If the attorney had acted without authority, the motion would have been well founded; but as the affidavit of the defendant is completely answered, the rule must be

Discharged with Costs.

1819.

DOE on the demise of COTTERELL *against* ROE.

Thursday, Feb. 11th.

Proceedings stayed in an action of ejectment till the costs of a nonsuit in a former ejectment brought to try the same title are paid. (a)

G. CROSS shewed cause against a rule for staying the proceedings till the costs of a former ejectment brought by the same lessor of the plaintiff were paid.

It appeared that the merits of this ejectment were tried at the last assizes, upon a declaration delivered in the year 1811, and the plaintiff was then nonsuited. Another ejectment was now brought by the same lessor of the plaintiff upon the same title; but the affidavit, on shewing cause, now suggested that the lessor of the plaintiff now sued in a representative character, and that since the former ejectment the plaintiff had taken out letters of administration; and therefore it was contended, that this case was distinguishable from *Keene* v. *Angel*. (b) He further suggested that the plaintiff was a very poor man, and was willing to go before the Master, and give such security for the costs of the present ejectment as he should direct.

W. E. Taunton, in support of the rule, said, that letters of administration might have been since taken out; but certainly that fact no where appeared upon any of the affidavits. This case fell precisely within

(a) Vide *Fairclaim* v. *Thrustout*, E. 24 *Geo.* 3. K. B. *Doe* v. *Law*, 25 *Geo.* 3. K. B. *Tidd.* 6th ed. 558. *Adams* on Ejectment, 2d ed. 316. from which authorities it appears, that in order to warrant the staying proceedings in the second ejectment till the costs of the former are paid, the title to be tried must be the same in both. It seems that a court of equity will in general stay the proceedings till the costs of a former suit in another court of equity respecting the same matter are paid, but the rule is not applicable to a case where a suit is brought in a court of equity after the trial of an action in a court of law, inasmuch as the *media* of proof in the two jurisdictions are very different. See *Wild* v. *Hobson*, 2 *Ves.* & *B.* 105.

(b) 6 *T. R.* 740.

1819.

Doe against Roe.

the rule laid down in the authority referred to. This action was founded entirely upon the same title, and was brought by the same lessor of the plaintiff, as appeared in the case decided at the last assizes, and therefore upon every principle this action must be stayed until the costs of the former ejectment should be paid.

Abbott C. J. The only question in this case is, whether the second ejectment is in substance brought to try the same title; if so, the rule is, of course, to stay the proceedings until the costs of the former ejectment have been paid. This rule must be made absolute, unless the plaintiff can shew that he is going upon a different title from that relied on in the former ejectment.

Rule absolute.

Thursday, Feb. 11th.

Griffiths *against* Stephens.

Prohibition may be issued to the sheriff to restrain him from proceeding in a replevin suit under 11 *G.* 2. *c.* 19. after the expiration of the five days allowed by 2 *W.* & *M.* st. 1. c. 5. for replevying a distress, and after sale of such distress, (*a*) where a person had acted for many years as clerk of replevins to several, and had been recognized as such by the present sheriff; but it did not appear that he had been appointed to his office under stat. 1 & 2. *P.* & *M.* c. 12. Court granted a prohibition to restrain the sheriff from proceeding in a suit where a replevin had been granted by such an officer. (*b*)

G. CROSS on a former day moved for a rule to shew cause why a writ of prohibition should not be issued directed to the sheriff of the county of *Hereford*

(*a*) But it seems that if the goods distrained remain unsold, the tenant has a right to replevy after the five days, although the goods may have been removed, *Jacob* v. *King*, 5 *Taunton* 451. 1 *Marsh* 155. sc.

(*b*) The statute 1 & 2 *P. M.* c. 12. s. 3. directs "that every sheriff of shires not being cities or towns made shires, shall at his first county day, or within two months next after he hath received his patent of his office of sheriffwick depute, appoint and proclaim in the shire town within his bailwick four deputies at the least, dwelling not above twelve miles distant from one another, which said deputies so appointed and proclaimed shall have authority in the sheriff's name to make replevies and deliverance of such distresses in such manner and form as the sheriff may and ought to do, upon pain that every sheriff for every month he shall be without such deputy shall forfeit 5*l.* one

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DOE against ROE.

to restrain him from proceeding in his Court in a plaint of replevin, on the ground that the replevin was out of time, being after the five days allowed by the stat. 2 *Will. & Mar. st.* 1. *c.* 5. for that proceeding, had expired. The affidavit upon which the motion was made stated that the sheriff had had notice of the expiration of the five days before he granted the replevin, and after the distress was sold he submitted that as the Sheriff's Court was a court of record with an inherent jurisdiction limited by act of parliament, (*a*) this Court could not take notice of that fact upon affidavit, and therefore the parties were driven to this proceeding, which, though novel in its nature, (*b*) was to a certain extent sanctioned by Lord *Loughborough* in *Grant* v. Sir *Charles Gould*, (*c*) in which that learned Judge said, " Another ground of prohibition is where an act has passed with respect to any authority resident in other courts, as in the Ecclesiastical Court, in which there is an inherent jurisdiction. In such a case the Courts of *Westminster* Hall have conceived that where the authority is limited by an act of parliament, the court which acted differently from the prescription of the act was in that instance exceeding its jurisdiction, and therefore liable to a prohibition." On this authority, and under the circumstances above mentioned, he prayed the prohibition; and a rule *nisi* was accordingly granted.

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half to the king and the other to the informer." In the case of peace officers, justices of the peace, constables, &c. it is in general sufficient to prove they acted in these cases without producing their appointment, even on the trial of an indictment for murder, per *Buller* J. *Berryman* v. *Wise*, 4 *T. R.* 366. So on an indictment for perjury committed by the defendant before a surrogate in the ecclesiastical court, proof that the person who administered the oath acted as surrogate, is sufficient *prima facie* evidence of his appointment and authority. *Rex* v. *Verelst*, 3 *Campb.* 432. *Rex* v. *Gardner*, 2 *Campb.* 513.

(*a*) Vide *Selwyn*, Ni. Pri. 1096, 7.

(*b*) A similar application had not been made for upwards of an hundred years, and a precedent was not known in the office.

(*c*) 2 *H. Bl.* 69.

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Doe against Roe.

Peake now shewed cause, and contended that the only question, as he apprehended, in this case, was, whether the goods distrained had been sold before the replevin was granted? and he submitted that the affidavits upon which this application was made left that point in doubt.

Cross then said that the circumstance of the goods having been sold before the replevin, was not the only ground upon which this motion was to be sustained. There was another, which he had not mentioned when he obtained the rule, viz. that the sheriff's deputy had no authority to grant replevins at the time this replevin was granted, inasmuch as he had not then received his warrant for that purpose from the sheriff, as required by 1 *Phil. & Mar. c.* 12, which directs that the sheriff shall appoint four deputies within two months, not above twelve miles from each other, to make replevins, on forfeiture of 5*l.* a month.

Peake, in answer to this objection, referred to the affidavit of the clerk of the replevins, which stated that he had been usually appointed for many years last past by the sheriffs of *Hereford*, as clerk of replevins at —— a place 18 miles distant from *Hereford*, where the sheriff's office had been usually held for the purpose of granting replevins in that district, and that conceiving himself to be fully authorized to grant replevins, he had granted the one in question. The affidavit did not state the fact of his having received an appointment from the sheriff of the present year, yet as the latter had recognised him as his deputy, and as he knew that he had always acted as replevin clerk, the Court would presume that he was a regularly constituted officer. But supposing there was any doubt upon this point, the Court would not try it upon a motion for a prohibition, particularly as it could not be denied that the sheriff himself had jurisdiction

in these matters. If the replevin in this case had been granted without any authority, it was open to the party aggrieved to bring an action and try the question, whether the officer had or had not any authority to grant replevins. The only question now was, whether this was a proceeding instituted in the Sheriff's Court without any authority whatever; and if it appeared that he had competent jurisdiction in these matters, the Court could not proceed by prohibition.

Cross in support of his rule was stopped by the Court.

ABBOTT C. J. It does not appear that the person who represents himself to have so long acted as clerk of the replevins to the sheriff of *Hereford* has received any appointment as required by 1 *Phil. & Mar.* There is nothing on the face of the affidavits to shew in point of fact that he has been regularly appointed, and we cannot substitute conclusion and speculation for fact. I am of opinion therefore that the replevin bond having been granted by a person who had no authority to grant it, the whole foundation of the suit fails, and the prohibition ought to go.

The other Judges concurred.

Rule absolute.

1819.

Thursday, Feb. 11th.

An order of *nisi prius* referring a cause to arbitration may be made a rule of Court, after notice of revocation of the arbitrator's authority. (a)

ASTON *against* GEORGE.

THIS was an action of slander, and by an order of Lord *Ellenborough*, the late Chief Justice, at the sittings at *nisi prius*, the cause was referred to arbitration. The arbitrator proceeded in his reference, and had examined all the witnesses for the plaintiff and several on the part of the defendant, when the latter in writing revoked the power of the arbitrator, on the ground that she could not procure the attendance of certain witnesses necessary to her defence, and consequently no award was made. Last Term, Lord *Ellenborough's* order was made a rule of Court, for the purpose of applying for the costs occasioned by the reference; and on a former day in this Term a rule was obtained, calling on the plaintiff to shew cause why the rule for making Lord *Ellenborough's* order a rule of Court should not be discharged, on the ground that a Judge's order could not be made a rule of Court after the revocation of the arbitrator's authority; and the case of *King* v. *Joseph* (a) was relied upon.

Littledale now shewed cause, and distinguished this case from *King* v. *Joseph*, where it was held, that a submission to arbitration by deed may be revoked by deed, and notice of revocation before award made, but that

(a) 5 *Taunt.* 452. Per *Gibbs* C. J. If the plaintiff has by deed covenanted to perform an award, and an award is made, the party cannot by revoking his authority relieve himself from the action of covenant, nor will the Court in such case set aside the award, because it would deprive the other party of his action; if there is an arbitration bond in a penalty, the penalty cannot be revoked, but the authority may be revoked at any time before the making of the award. The submission should not, under such circumstances, have been made a rule of Court after the revocation of the arbitrator's authority, and the rule so obtained ought to be set aside.

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after the revocation the submission ought not to be made a rule of Court. He contended, that the order of a Judge was very different in its nature from a deed, which was an instrument executed between the parties themselves. The private agreement of the parties might be revoked by their own act, so as to avoid its effect. Where a reference takes place at *nisi prius*, the order cannot be made a rule of Court until the next Term, but a revocation of the arbitrator's authority in the meantime would avoid its effect. It is in the power of the party, before the next Term arrives, to countermand the authority, and avoid the reference, upon the principle that the submission to the reference is like an agreement between the parties. Not so of a Judge's order, which is a judicial act, but will not be binding upon the parties until it is made a rule of Court, therefore it is necessary to make it a rule of Court for that purpose. In this respect, therefore, the case of *King* v. *Joseph* is wholly inapplicable to the present, because there it was not necessary to make a submission to arbitration by deed a rule of Court. In that case there might be a remedy by deed, but here there is no remedy at all, unless the Judge's order is made a rule of Court.

Hullock Serjt. and *E. Lawes*, in support of the rule, contended, that a Judge's order was in effect the same as an agreement or deed, and that it is therefore not necessary to make it a rule of Court in order to give effect to it. If this submission to arbitration had been in point of fact by deed, the case of *King* v. *Joseph* would have been exactly in point; but though it was not by deed, yet, from the nature of the instrument, it was really the same in point of law. They cited *Tremenhere* v. *Tresellian*, (a) *Melire* v. *Gratrix*, (b) *Hide*

(a) 1 *Sid*. 452. (b) 7 *East*. 608.

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v. *Petit*, (*a*) and *Salk*. 73; and contended, that in all events a Judge's order could not be made a rule of Court after the authority of the arbitrator was revoked.

ABBOTT, C. J. I am of opinion that a Judge's order is mainly distinguishable in its nature from a deed or any other instrument executed between the parties. The parties may revoke a deed or instrument between themselves, but they cannot revoke the authority of the Judge; and therefore I am of opinion that the rule for discharging the rule for making Lord *Ellenborough's* order a rule of Court must be discharged.

BAYLEY J. I am entirely of the same opinion; and if we were not to hold that the Judge's order should be made a rule of Court, there would be no means of obtaining the judgment of the Court against a party upon the subject of costs. Where the parties execute a deed, or enter into an agreement, they may revoke the authority of the arbitrator before the submission is made a rule of Court, but the party has a remedy by action of covenant in case there is any default in the performance of the agreement or the obligations of the deed. But not so of a Judge's order, for there is no remedy for the party unless it is made a rule of Court, so that he may obtain judgment. The Judge's order is not in the nature of an agreement or deed, and therefore I think it ought to be made a rule of Court.

HOLROYD J. The Court has a distinct authority from that which the parties would have by an agreement between themselves. For even supposing the submission itself might be revoked by one of the parties, that would be no revocation of the order of the Judge,

(*a*) 1 Chan. Cas. 185.

because the parties have no authority to revoke the act of the Judge, and although the submission may be revoked, still if the Judge's order authorizes the arbitrator in making his award, there is nothing to prevent the order being made a rule of Court.

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BEST J. The party may revoke the submission, but that cannot put an end to the order of the Judge. If there is any person to be bound under the order, it must be made a rule of Court. The parties must be bound by the order, but its binding effect is acquired by its being made a rule of Court. The order directs that the arbitrator shall do so and so, and gives him a power to award costs, but the Court by the terms of the order has the power to say what costs the party shall pay. There have been two or three cases cited, but it appears to me that those cases are directly against the argument which has been urged on the part of the defendant. The case of *Hide* v. *Petit* (a) is a decisive authority in this case, because it goes to shew that it is necessary to have a rule of Court, in order to impower the Court to grant an attachment for disobedience to the award. And the present case is clearly distinguishable from *Tremenhere* v. *Tresilian*. (b) I am of opinion therefore that this order must be made a rule of Court.

Rule discharged.

(a) 1 Chan. Cas. 185. (b) 1 *Sid.* 452.

Thursday, Feb. 11th.

SAME *against* SAME.

Where an order of reference is made at *nisi prius* with the usual clause, empowering the Court to award costs for affected delay, or otherwise wilfully preventing the arbitrator from making his award; and one of the parties, after the arbitration has been entered, revokes the arbitrator's power, in consequence of being unable to procure the attendance of necessary witnesses, he is not liable to costs within the meaning of the order.

LITTLEDALE obtained another rule in this case, calling upon the defendant to shew cause why it should not be referred to the Master to tax the costs occasioned by the reference of this cause to arbitration, relying upon the words of Lord *Ellenborough's* order, viz. "that if either party by affected delay or otherwise wilfully prevent the said arbitrator from making the award, he or she shall pay such costs as the Court of our said Lord the King shall think right and just." (*f*)

Hullock Sergeant, and *E. Lawes*, shewed cause against the Rule, and said, that the question was, whether under the circumstances of this case it could be deemed reasonable and just that the defendant should be called upon to pay any costs occasioned by this arbitration. It was true that the arbitrator had examined 22 witnesses for the plaintiff, and 11 or 12 for the defendant, when the latter revoked his authority, expressly on the ground that she was unable to procure the attendance of certain necessary witnesses, who had been subpœnaed to attend the arbitrator on her behalf, but who positively refused so to do. The question therefore was, whether the mere act of revoking the authority of the arbitrator under such circumstances could be considered within the terms of the Judge's order as *affectedly delaying* or *wilfully preventing* the arbitrator from making his award. If the defendant's act was just and reasonable, it did not fall within the

(*a*) See form of order of Nisi Prius *Tidd's* Forms, 4th ed. 346, 7.

mischief provided against in the order, and therefore she was not bound to pay costs. 1819.

SAME against SAME.

Littledale, contrà, submitted that the defendant ought to pay the costs of the reference, because, before she agreed to the reference, she ought to have been certain whether she was likely to procure the attendance of all her necessary witnesses. If before she had gone to the reference she had been assured by her witnesses, that they would attend, it certainly would be rather hard, if they did not attend, to compel her to pay the costs. It did not, however, appear that she had ever made any application to those persons before she agreed to the reference, to know whether they would attend. It appeared that there had been six meetings before the arbitrator, and that she had examined a great many witnesses on her behalf, and it was but reasonable in all events that she should pay the costs of the two or three days employed in examining her own witnesses. This case was not similar to that where a party applied to put off a trial, and it was not necessary that the revocation of the arbitrator's authority should be *obstinate* and *contumacious* in order to bring the defendant within the terms of the Judge's order.

ABBOTT C. J. By the terms of the order "if either party shall by affected delay or otherwise wilfully prevent the arbitrator making the award, he or she shall pay such costs as the Court shall direct." The Court has no power to direct the payment of costs, unless the arbitrator has by *affected delay* or *otherwise* been prevented from making his award. It appears to me, that in order to bring the party within the operation of these terms, it must be a *wrongful* and *unreasonable* prevention. Now I cannot say that the prevention of the arbitrator from making his award, in consequence of the absolute impossibility on the part of this defendant of

1819. Same *against* Same.

obtaining the attendance of witnesses necessary for her defence, does fall within these terms. That cannot be a wilful and wrongful act which arises from the necessity of the case; nor can I say that the party has been guilty of *affected delay*; unless it appears to be *wilful*; and I think the word "*otherwise*," which follows those words, means nothing more, because it must be something wrongful and unreasonable.

Bayley J. I agree with my Lord in his construction of the word "otherwise," because it must be connected with "*affected*" *delay*,—they are both *ejusdem generis*. The word "wilful" in that part of the order is synonimous with *wrongful*. The Court must look to the motives of the party, and it appears to me that the conduct of the defendant in this case does not come within the substantial meaning of the order; and therefore I think the Court is not at liberty to award any costs.

Holroyd J. I am of the same opinion. I think that there must not only be a prevention, but that the prevention must be by reason of the *misconduct* of the party, in order to call upon the Court to charge her with costs. It appears that the defendant had used every means in her power for the purpose of gaining the attendance of her necessary witnesses, and that she did not revoke the arbitrator's authority until there was no hope of procuring their attendance. This is not like the case of a trial at law, where the party could compel the attendance of the witnesses. It appears to me, therefore, that this is not such a prevention as under the circumstances would fall within the meaning of the words "affected delay or otherwise wilfully prevent." *Wilful* means a spirit of opposition, whether right or wrong, reasonable or unreasonable.

Best J. concurred.

Rule discharged.

Ex parte BARTLETT.

Thursday, Feb. 11th.

An attorney who has omitted to take out his certificate by reason of pecuniary difficulties and illness, will not be readmitted without a Term's notice. (*a*)

ADAM moved, that this gentleman might be re-admitted as an attorney of the Court, upon payment of the arrears of duty, and a small fine, without a Term's notice, on an affidavit stating that he had been duly admitted and sworn, but for some time past had omitted to take out his annual certificate, in consequence of his having involved himself in pecuniary difficulties, and having been subjected to severe illness subsequently thereto. The affidavit, however, did not state that during that time he had discontinued to practise, or that he had continued to practise under a supposition that his certificate had been obtained.

ABBOTT C. J. If an attorney discontinues practising, and applies to be readmitted, it is like a new admission, and he must give the usual notice in such cases. The affidavit here does not state that the party discontinued to practise. This is not like the case where an attorney continues to practise under a mistaken idea that his certificate has been taken out by his agent, for in such case the Court has readmitted an attorney without a Term's notice. (*b*)

BAYLEY J. He must distinctly swear that he had not *continued to practise*, otherwise he might be criminally culpable. The only exception which has been made so as to dispense with a Term's notice, is where the party has continued to practise, having reason to suppose that his agent, or some other person, has taken out a certificate for him.

(*a*) See Ex parte ——— 8th *Feb.* ante 163.

(*b*) Ex parte Winter, 1 *Barn.* & *Ald.* 189.

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BEST J. If this gentleman could be readmitted upon the affidavit before the Court, it would be virtually doing away with the rule which requires a Term's notice.

Application rejected.

Thursday, Feb. 11th.

Ex parte WATSON.

An attorney will not be readmitted without a Term's notice, on the ground that he has been abroad for some time, and that his agent neglected to take out his certificate during his absence. (*a*)

TINDAL applied on behalf of this gentleman to be readmitted an attorney of the Court, on paying a small fine and the arrear of duty, but without a Term's notice, on an affidavit stating that his agent had taken out a certificate for him in *November* last, not knowing at the time that he had not had his certificate for the preceding year, which omission was occasioned by his having gone to Paris upon business, and elsewhere, and his agent having neglected to take out his certificate. Under these circumstances it was necessary this gentleman should apply to the Court to be readmitted without a Term's notice. He referred to Ex parte *Winter*, (*b*) and Ex parte *Dent*, (*c*) as authorities for this application.

BAYLEY J. said, this case was distinguishable from those referred to, because they were cases where the party had been continuing to practise, and had been misled, by supposing that the agent had duly taken out the certificate. But here that excuse did not apply, because the gentleman on whose behalf this application was made, must necessarily have discontinued practising whilst he was abroad, or else he might be continuing to practise, knowing that he had not taken out his cer-

(*a*) See preceding Case.

(*b*) 1 *Barn. & Ald.* 189. (*c*) Id. 190.

tificate. Unless some decisive authority could be shewn, his Lordship, sitting as a single Judge, did not think he could readmit the attorney without a Term's notice.

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Ex parte WATSON.

Application refused.

DE NORMANVILLE *against* MEYER.

Thursday, Feb. 11th.

Plea of misnomer in person, without the signature of counsel; Held that this was irregular, and that plaintiff might sign judgment as for want of a plea. (*a*)

IN this case the defendant appeared and pleaded in person, and the plaintiff's attorney had signed interlocutory judgment, and had given notice of executing a writ of inquiry; notwithstanding, the defendant had filed a plea of *misnomer*, which was pleaded in *person*, and *not* signed by counsel.

Barry moved to set aside the judgment, on the ground that it was signed irregularly, there being a plea filed within the four days according to the practice of the Court. The ground upon which he presumed that the plaintiff had signed the judgment, was that of considering the plea so filed as a nullity, because by the rule of the Court all special pleas must have the signature of counsel annexed thereto, before they can be filed; (*b*) but he submitted, that as the plea of misnomer was such a plea as no other person could be so cognizant of as the defendant himself, and as he had verified it by an oath; and as the rule of Court, with regard to special pleas, only required the sanction of counsels' names,

(*a*) In C. P. although a defendant conducts his cause in person, if he file a special plea it is a nullity, unless it be signed by counsel. *Samuel* v. *Dunne*, 3 *Taunt*. 386.

(*b*) By rule 18 *Car*. 2. "It is ordered that no *special pleas* or demurrers in law, in any cause here in Court now depending or hereafter to be prosecuted, shall be received by the clerks of the papers, before such pleas or demurrers shall be signed with the proper hand of some counsel in that behalf retained." As to what pleas must be signed and what must not, see *Tidd*, 6th ed. 713.

1819.

De Normanville against Meyer.

in consequence of the responsibility required in such matters, and the responsibility of the defendant's oath being greater than the vouching of counsel or solicitor, it ought to supersede the necessity of counsel's name and signature being annexed to it; and that therefore it should have been considered a good and valid plea, and that consequently the judgment so signed was irregular.

Bayley J. considered the rule of Court peremptory; and asked, whether the plea was or was not a special plea?

Barry answered, that it was certainly a special plea, but there were other pleas which were special, such, for instance, as *plene administravit*, and others; and yet defendants not employing attorney or counsel, but defending in their own proper person as in this case, were by the uniform practice of the Court allowed to file such pleas, which pleas were more matters of law than of fact; whereas the plea of *misnomer* was a plea of mere fact, and cognizable especially by the defendant; and it would be hard if such a plea, being a matter of fact, should not be allowed.

Bayley J. said, that he considered the plea a special one, and that therefore it came within the rule, and required the signature of counsel.

Reader, amicus Curiæ, said, that the objection taken seemed not to be, that the plea was not a special plea, but that the plea of *misnomer*, verified by the oath of the defendant in person, was such as might claim a distinction and be put upon the same footing as *bankruptcy*, *nil debet* or *plene administravit*.

Comyn mentioned a case which he thought brought

the point taken, within the rules applicable to pleas of bankruptcy, &c. But

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De Normanville *against* Mayer.

Bayley J. The rule of Court requires the signature of counsel to such pleas, and it is the irregularity of such proceedings that the rule is calculated to prevent. The object of the rule was, that no special pleas should be introduced on the files of the Court, without being sanctioned with the approbation of counsel, testified by his signature.

Barry took nothing by his motion.

Rowsell *against* Cox.

Thursday, Feb. 11th.

Plea of *comperuit ad diem* in debt on bail-bond, or a general demurrer, must be delivered and not filed; and if it be filed judgment may be signed for want of a plea. Delivery of declaration not necessary to sustain a judgment signed for want of a plea, for a declaration *de bene esse* may have been filed.

ACTION against the defendant upon a bail bond. The writ was sued out on the 16th of *January*, and the defendant regularly appeared and took the declaration out of the office, after which he *filed* a plea of *comperuit ad diem*, and on the 2d of *February* the plaintiff signed judgment as for want of a plea.

E. Lawes on a former day obtained a rule calling on the plaintiff to shew cause why the judgment should not be set aside for this alleged irregularity.

Barrow now shewed cause, and said that the plea of *comperuit ad diem* was a sham plea, and ought not to have been filed, but delivered.

E. Lawes, contrà, contended, that by the practice of this Court, it was not necessary to *deliver* a plea of this description, and he referred to *Tidd's* Practice. (*a*)

(*a*) *Tidd*, 6 ed. 713. It is there laid down, that there are certain common pleas that *need not* be signed or filed, but *may* be delivered to the plain-

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ROWSELL *against* COX.

ABBOTT C. J. (After conferring with the Master.) The Master reports to us, that such a plea as this ought to be delivered, and not filed. The attorney before he signs judgment, it is true, must search in the office for a plea, and he signs judgment at his peril if he signs without search; but if he aftewards discovers that there is a plea in the office which ought never to have been put there, he is nevertheless entitled to take advantage of the irregularity.

BAILEY J. It was decided in Hilary 1817, that a general demurrer to the declaration must be *delivered*, and that filing it is irregular, and the plaintiff may sign judgment, though he knows that it is filed. (a) In the present case, if the judgment could not be signed, the consequence will be that a party will be entitled to file every plea which ought to be delivered, and a plaintiff will not be able to sign judgment unless he searches at the office of the clerk of the papers, and when he does search he will probably find a plea filed which ought to have been delivered. If the argument in this case is to hold good, judgment never can be signed for filing a plea which ought to be delivered.

HOLROYD J. The plaintiff must search to see if the plea is filed, for otherwise, if there is a special plea

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tiff's attorney, such as *comperuit ad diem*, &c. See *Henderson* v. *Sansum*, post 225, 12th *Feb.* There is a rule of Court against *delivering* pleas that ought to be *filed*. *Mich.* 2 *W.* & *M.* It is ordered that no attorney or clerk attending here in Court presume to deliver to any other attorney or clerk attending here in Court, or to any other person, or receive from any attorney or clerk, or any other person, any special plea which ought to be filed in the office of the clerk of the papers, or a copy of such plea, before such plea shall be put into the office of the clerk of the papers, and that such copy of such plea shall be made by the clerk attending in the aforesaid office of the clerk of the papers, and signed under the hand of one of the clerks attending there.

(a) And see *Tidd*, 6th ed. 743.

properly filed, and they sign judgment without searching, that would be irregular. Therefore the plaintiff must have notice of a plea which ought not to be filed. It appears here that the defendant has filed a plea which ought to be delivered, and therefore I think he is irregular.

E. Lawes then urged another objection to the regularity of the proceedings, viz. that there was no declaration delivered. But

The COURT said, that this objection was too late after judgment signed. The plaintiff might have filed a declaration *de bene esse* last Term, and yet the proceedings would still be regular.

Barrow for the plaintiff consented to let the defendant go to trial, on the condition of paying the costs occasioned by the plea, and the costs of this application, and taking short notice of trial.

Rule absolute on these terms.

DOE *on the demise of* JONES *against* ROE.

Thursday, Feb. 11th.

Service of declaration in ejectment upon the servant of the tenant in possession insufficient, although the affidavit swears to belief that the tenant himself keeps out of the way for the purpose of avoiding service. (a)

TINDAL moved for judgment against the casual ejector, on an affidavit of the service of the declaration in ejectment on the premises upon a servant of the tenant in possession; the affidavit further stating, that the tenant himself was now resident in France, whither he was believed to have gone for the purpose of avoiding the service of the declaration upon his person.

BAYLEY J. said this would not do. Service of the declaration upon a servant had long been held bad.

(a) Vide ante 118. *Adams* on Ejectment, 2d ed. 209, 210. 1 *Tidd*, 6th ed. 509.

1819.

Thursday, Feb. 11th.

In the Matter of Crowe.

An insolvent who does not appear in pursuance of the rule he has obtained for coming up on a particular day to take the benefit of the Lords' Act, cannot come up on another day without a fresh rule for that purpose; and therefore a motion to discharge his rule is unnecessary. (a)

THIS defendant had obtained a special rule for the purpse of coming up to be discharged under the Lords' Act, but he did not appear on the day mentioned in the rule.

Andrews now moved to discharge the rule, which he thought necessary to do, lest the defendant should come up on another day under the same rule, and thereby take the plaintiff by surprise, who might not be aware of the day on which the insolvent chose to bring himself up.

Bayley J. after conferring with the Master, said, there was no occasion for this motion, as the insolvent could not be brought up again without another application for a fresh rule.

(a) By the 32 *Geo.* 2. c. 28. s. 13. it is enacted, that if the Court shall be satisfied that due notice has been given to the creditors, of the prisoner's intention to apply for his discharge, the petition shall be received, and the Court shall thereupon, by order or rule of the same Court, cause the prisoner or prisoners so petitioning to be brought up to such Court on some certain day in such order or rule to be specified; and the creditors at whose suit the prisoner is charged in execution are to be summoned to appear personally or by attorney in such Court, at some certain day specified for that purpose in such rule or order, a copy of which rule should be served on each creditor, and also on the gaoler, and an affidavit made of such service; or if the creditor abscond, so that he cannot be personally served with a copy of the rule, the Court will order that service upon the attorney shall be deemed sufficient. *Dorrell* v. *Bishop, Barnes* 384. *Tidd,* 6th ed. 379.

Thursday, Feb. 11th.

DOE on the demise of ——— against BADTITLE.

Service of declaration upon a person whom the deponent believes to be the tenant in possession bad, because the notice at the foot of the declaration was not addressed to such person. (a)

F. *POLLOCK* moved for judgment against the casual ejector, upon an affidavit stating that the deponent went to the premises in question for the purpose of serving the tenant in possession with a declaration, that he saw a female on the premises, whom he verily believed to be the person actually in the occupation of the house, and that he accordingly left the declaration with her.

BAYLEY J. said this was not sufficient, as the notice to appear was not addressed to the woman upon whom it was served.

Rule refused.

(a) The notice at the foot of the declaration must be directed to the tenant in possession, by name. *Doe* v. *Roe*. 1 *Moore* 113. *Adams* on Ejectment, 2 edit. 202 It may be addressed to any tenant in possession, though he be so as servant or agent for another party. *Doe* dem. *James* v. *Staunton*, ante 118.

Thursday, Feb. 11th.

MINCHIN and others against HART.

Plaintiff having become bankrupt before plea pleaded, defendant obtained an order for giving security for costs, and afterwards pleaded bankruptcy; *Held* that the plea could not be set aside, but that the order for giving security for costs should be rescinded, the plaintiff to pay the costs of that application, and the defendant's rule discharged.

IN this case the writ against the defendant issued in *Trinity* Term 1818, and a declaration was delivered on the 12th of *January* 1819, but not filed, and the defendant was under terms to plead within the first four days of the present Term. Before plea pleaded the plaintiff became bankrupt, upon which the defendant obtained a Judge's order for security for costs two days before the time for pleading expired, and afterwards pleaded the plaintiff's bankruptcy in bar. On a former day, *Minchin* obtained a rule calling on the defendant to

1819.

Minchin *against* Hart.

shew cause why the plea of bankruptcy should not be set aside as irregular, having been pleaded after such order had been obtained, and why the assignees should not be at liberty to continue the action in the bankrupt's name.

G. Marriott now shewed cause, and urged that the case was not distinguishable from *Kinnear* v. *Tarrant*,(a) where it was held that in *scire facias* against bail upon their recognizance, it is competent to the defendant to plead in bar against the issuing of execution; that before the issuing of the alias writ of *scire facias*, the plaintiff became bankrupt and a commission issued against him, on which he was declared a bankrupt before the return of the writ, and his effects, debts, &c. assigned to the provisional assignee, who, before plea pleaded, assigned to the assignee under the commission, who was entitled to sue the defendants, &c. The language of Lord Mansfield in the MS. case cited by Lord *Ellenborough* is, that this plea is a legal bar, and *cannot* be set aside; and the same terms are repeated by Lord *Ellenborough* in his adjudication of the case before the Court.

Abbott C. J. We cannot deprive the defendant of this plea which it is the object of the rule to set aside. The utmost we can do is to rescind the order for giving security for costs, and discharge the rule upon the defendant undertaking to pay the costs of the application for that order. The defendant takes a step by which he puts the plaintiff to expense, and if he meant to allow the plaintiff to go on, he should not have interposed by seeking to impose the terms of giving security for costs before plea pleaded.

(a) 15 East. 622.

BAYLEY J. The Court would not have given the defendant an order for the security for costs if he had said he meant to defeat the action by the plea of bankruptcy.

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MINCHIN *against* HART.

BEST J. It is suggested that the defendant has a good defence upon the merits. In that case the action would have gone on for the benefit of the defendant. However, as we cannot take the plea off the file, the least the defendant can do is to pay the costs of the application of the order for the security for costs.

Rule discharged, defendant paying the costs of the order for security, and said order also discharged.

A. Moore was to have argued for the plaintiff.

THE KING *against* A. B. and C. D. JUSTICES OF STAFFORDSHIRE.

Thursday, Feb. 11th.

An attorney has no right to be present on the hearing of an information on the Game Laws, and therefore where an attorney for a defendant was excluded by the magistrates from the justice-room, the Court refused a criminal information against the magistrate on that ground; (*a*) An error in the proceedings before magistrates is no ground for a criminal information; and the Court will not interfere against them, unless they have acted corruptly. (*b*)

CHITTY moved for a criminal information against two justices of *Staffordshire*, on the ground of an abuse of their magisterial office, in separately convict-

(*a*) This decision, however, must not be considered as authorizing justices of the peace in all cases, and under all circumstances, to exclude a party from the benefit he may wish to derive from his attorney's presence on the hearing of an information on a penal statute. When a magistrate acts *ministerially*, and is examining a party on a criminal charge, it may be essential for the purposes of public justice that the examination should be private, and not interrupted by the interference of an attorney for the prisoner; though, even in that case, the counsel or attorney of such prisoner is frequently permitted to be present, and advise him what questions he should answer. But, when a magistrate acts *judicially*, and he is about to hear an information, and pro-

1819.

The King against Justices of Staffordshire.

ing two persons under the 52 *Geo.* 3. c. 93. schedule L. sect. 13. for using dogs to kill game, not having obtained game certificates. The grounds in support of this motion were principally, that the magistrates had deprived the defendants of the advantage of legal assistance, by ordering their attorney out of and keeping him excluded from the justice room during the hearing of the information. It was also objected, that the accusation was informal, and the innocence of the parties was expressly sworn to; but the affidavits imputed no corrupt motive to the magistrates other than that of turning the attorney out of the room.

Bayley J. What right had the attorney to be there? His presence would only produce confusion and irregularity in the proceedings of the magistrates.

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ceed to conviction, many cases may occur in which the practice of excluding an attorney would be unreasonable. In courts of justice in general, a defendant upon a charge of any offence not amounting to felony, has a right to appear and defend by attorney, *Bac. Ab.* Attorney B.; and the proceedings of justices of the peace by summary conviction being matter of record (*Paley* on Convictions, 38) why should a party be deprived of the same means of defence on such a proceeding, as in other courts? Suppose a defendant illiterate or uninformed, and exposed to a prosecution on the Game Laws, involving many complicated points of law, and especially title, it would frequently happen, in prosecutions before a magistrate, that the expense of counsel would be greater than the defendant could afford, or it might happen in a distant part of the country that no counsel nor any advice whatever, except that of an attorney, could be procured in time; it would then be rather anomalous to maintain, that on the trial of a cause in a superior Court the defendant may have the benefit of his legal advisers, and that they are to be excluded on a summary proceeding before a magistrate acting *judicially*. In the *King* v. *Simpson*, 1 *Stra.* 44, it was held, that a conviction for deer stealing might be made in the absence of a defendant, and upon an appearance by an attorney appointed by him to defend for him, and the Court said, "We think that it is certainly good; for the offender may entrust his defence to another, and the justices cannot enforce him to appear in person." *Paley*, 107.

(*b*) It is a general rule, that a criminal information will not be granted against a magistrate on account of an error in judgment; but it must appear that he has acted corruptly or with gross partiality. *The King* v. *Brooks*, 2 *Term Rep.* 196; *Rex* v. *Bince*, *Caldecot* 305; 2 *Burr*, 719, 722, 1162. 1 *Bla. Rep.* 422; 2 *Strange*, 1182; 1 *T. R.* 652.

1819.

THE KING *against* JUSTICES OF STAFFORDSHIRE.

An attorney has no right to interfere with the duties of the magistrate in his own justice room.

Chitty submitted, that it was for the benefit of the defendant on a penal information that he should have the assistance of legal advisers, more especially as questions of title frequently arise in prosecutions under the game laws, and the same objection might be urged to the presence of counsel.

BAYLEY J. An attorney in all events has no right to be present. It may be a different thing where counsel are employed. There is no corrupt motive imputed here to the magistrates, and therefore there is no pretence for this motion.

BEST J. I am of the same opinion. If there is any thing improper in the form of the conviction, the parties have another remedy; but any such error is no ground for a criminal information, which can only be granted against a magistrate when he has acted corruptly, and not when he has acted merely erroneously.

Rule refused. (*a*)

(*b*) *Abbott* C. J. and *Holroyd* J. were absent.

1819.

Friday, Feb. 12th.

ORCHARD AND ANOTHER *against* THOMAS.

An insolvent debtor who has neglected to apply for his discharge under the Lords' Act, 32 *Geo.* 2. *c.* 28. in the next Term after he was charged in execution, and afterwards applies, but was prevented *by poverty* from proceeding until this Term, cannot now be discharged, for the 33 *Geo.* 3. *c.* 5. *s.* 5. only excuses delays occasioned by ignorance or mistake.

CHITTY on a former day had obtained a rule for the bringing up of the defendant on this day, in order that he might be discharged as an insolvent debtor out of custody under the Lords' Act, on an affidavit which stated that the defendant had been charged in execution by the plaintiffs before *Hilary* Term in 1818, and that on account of ignorance he had neglected to apply to the Court in that Term, in pursuance of the Lords' Act, 32 *Geo.* 2. *c.* 28. That in *Easter* Term following he had given the proper notice to the plaintiffs required by that act, preparatory to his discharge; but that on account of his having a very large family, and extreme poverty and inability to defray the necessary expenses, he had hitherto been prevented from proceeding on such notice, but had recently given a proper notice.

D. F. Jones, on behalf of the plaintiffs, now opposed the defendant's discharge, and insisted that the 32 *Geo.* 2. *c.* 28. *s.* 13. was imperative. "It shall and may be lawful to and for any such prisoner, *before the end of the first term* which shall be next after any such prisoner shall be charged in execution by his creditor, to exhibit his petition to the court." The application was therefore now too late. He submitted, that the statute 33 *Geo.* 3. *c.* 5. *s.* 5. was not applicable to this case. It enacts, that "where any debtor shall have neglected to take the benefit of the acts within the time limited, and shall make it appear to the court out of which the execution issued, that such neglect arose from *ignorance or mistake,* such debtor shall then be entitled to take the benefit of the acts, as if he had taken the same within the time so limited as aforesaid."

1819.

ORCHARD *against* THOMAS.

It appeared from the defendant's own affidavit, that he was aware of the necessity of applying to the Court in *Easter* Term next, and his subsequent pecuniary embarrassments did not constitute an excuse for the further delay. The application was therefore too late, and the defendant must be remanded.

Chitty submitted, that these acts, passed with a humane object in favour of prisoners for debt, who must give up the whole of their property on obtaining their discharge, ought to be construed liberally. The words in the Lords' Act, "shall and may," are not necessarily compulsory on the prisoner to make the application in the first term. (*a*) He also referred to *Tidd's* Practice, where, upon the authority of decided cases, it is laid down, that a prisoner is entitled to the benefit of the acts who has been prevented from applying for it in due time by the misconduct of his agent, or by his ignorance of the creditor's place of abode till recently before his application. (*b*) He submitted, that under these circumstances the defendant was entitled to his discharge.

HOLROYD. The statute 33 *Geo.* 3. *c.* 5. *s.* 5. by its recital evinces that the legislature intended by the prior act to compel the prisoner applying for his discharge to do so within the limited time; and the same statute only allows of two descriptions of excuse for delay in making such application, namely, *neglect arising from ignorance or mistake.* Taking the affidavit in this case to be true, yet the only excuse it offers for the delay is poverty, and therefore, however I may

(*a*) *Nicholls* v. *Neilson*, 2 *Marsh* 200. Vid. *Sibley* v. *Sibley*, *Barnes* 378. *Tidd's* Pract. 6th ed. 377.

(*b*) *Tidd*, 6th ed. 377, 8. 4 *T. R.* 281, 367.

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ORCHARD *against* THOMAS.

regret the situation of the defendant, I have no jurisdiction to afford him relief, and he must be remanded.

Friday, Feb. 12th.

DIMOND *against* CLARKE and another.

Attachment granted on the Master's allocatur for costs due from the plaintiff in the cause to his attorney, although the attorney was disqualified from practising, by not having taken out his certificate at the time of the business done, the plaintiff having received the whole of the debt and costs from the defendant. (*a*) Persons discharged under the Insolvent Act are only discharged as to those creditors to whom they give notice of their intention to apply to be discharged. (*b*)

THE plaintiff had brought an action against the defendants upon a policy of insurance against fire, and obtained a verdict at the *Lent* Somerset assizes 1816 for the sum of 800*l.* The costs were taxed as between party and party at 338*l.* and the whole amount of the debt and costs was afterwards paid to the plaintiff himself and not to his attorney. Mr. *W. E. Empson*, the plaintiff's attorney, having afterwards made application

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(*a*) The statute 37 *Geo.* 3. c. 90. s. 30. enacts, That if any person shall in his own name, or in the name of any other person or persons, sue out any writ or process, or commence, prosecute, carry on or defend any action or suit, or any proceedings in any of the Courts aforesaid, for or in expectation of any gain, fee or reward, or shall do any act in any of the said Courts as an attorney, solicitor, notary, proctor, agent, or procurator, of such Court, without obtaining a certificate in the manner therein directed, *or without entering the same* in one of the Courts aforesaid wherein such person shall be admitted, enrolled, sworn, or registered, as solicitor, attorney, notary, proctor, agent, or procurator, every such person shall for every such offence forfeit and pay the sum of 50*l.* and shall be and is hereby made incapable to maintain or prosecute any *action or suit* in any court of law or equity for the recovering any fee, reward or disbursement on account of prosecuting, carrying on, or defending any action, suit, or proceeding, or having prosecuted, carried on, or defended any action, suit or proceeding, or any matter or thing relating thereto, without such certificate as aforesaid.

(*b*) See *Baker* v. *Sydee*, 7 *Taunt.* 179 acc. The statute 53 *Geo.* 3. c. 102, sect. 10, directs that the Insolvent Debtors' Court shall specify in the order for the prisoner's discharge, the several persons against whose demands such prisoner shall be deemed by such Court entitled to be discharged by virtue of the act. The act therefore does not operate as a general discharge of the prisoner from all his debts, but only from such as are specified in the order by which the prisoner is discharged. See further 54 *Geo.* 3. c. 23. s. 7.

for the payment of his bill, the plaintiff obtained a Judge's order for its taxation, having previously given the usual undertaking to pay what should appear to be due to Mr. *Empson* on such taxation; but it was sworn that at the time such undertaking was given the plaintiff was not aware that *Empson* was not in a situation to proceed for his costs. The plaintiff neglected to appear before the Master at the taxation of the bill, and Mr. *Empson's* costs remaining unpaid, were allowed by the Master's allocatur at the sum of 122*l.* 18*s.* 5*d.* *Marryatt* having obtained a rule *nisi* for an attachment for non-payment of this sum,

Chitty now shewed cause upon two grounds, appearing upon affidavit, First, that the plaintiff's attorney had omitted to enter his certificate with the proper officer, and was consequently precluded from recovering his costs; (*a*) and previously to the obtaining of such certificate, he had omitted to take one out for the space of a whole year. At a subsequent period he was readmitted by the Court on payment of the arrears of duty and 20*s.* fine. The 37 *Geo.* 3. *c.* 90. *sec.* 31. enacts that "every person admitted, sworn and enrolled in any of the Courts as therein mentioned, who shall neglect to obtain his certificate thereof for the space of one whole year, shall from thenceforth be incapable of practising in his own name, or in the name of any other person, in any of the said Courts, by virtue of such admission, entry, and enrolment, and the admission, entry and enrolment of such person in any of the said Courts, shall be from thenceforth null and void." It was therefore submitted that the attorney could not recover this sum of money by means of an attachment, as he was practising illegally at the time when the business was performed. The second ground of objection was, that

(*a*) See 37 *Geo.* 3. c. 90. s. 27, 30. ante 222, n. (*b*)

1819. DIMOND *against* CLARKE.

the plaintiff, since his supposed liability accrued, had been discharged under the act for the relief of insolvent debtors. (a)

Marryatt and *Reader* were heard in support of the rule for the attachment.

The COURT at first seemed inclined to think that the plaintiff, by undertaking to pay what might appear due, had precluded himself from objecting to the attorney's right to recover for the business done, on the ground of his not having obtained his certificate, but afterwards were of opinion that construing these words as meaning that the party undertook to pay what should legally appear to be due, the objection might be taken notwithstanding such undertaking. However it was considered that as the plaintiff in the first instance had received the whole debt and costs, Mr. *Empson* might recover the sum which the Master had found due, without the aid of his character of attorney, by treating the money originally received by the plaintiff for the costs of the action, as received *pro tanto*, to the use of the attorney. Upon the second point, it did not appear that the plaintiff had given any notice to Mr. *Empson* of his intention to apply for his discharge under the Insolvent Act, and therefore the plaintiff would not be discharged by the operation of that act from the debt due to the attorney.

(a) 53 *Geo.* 3. c. 102.

1819.

HENDERSON *against* SANSUM.

Friday, Feb. 12th.

A general plea of bankruptcy must be *delivered* and not *filed*; but on an affidavit of merits the Court set aside the judgment signed for want of a plea on terms. (*a*)

READER, on a former day, moved to set aside the judgment in this cause, for irregularity, with costs, such judgment having been signed after a plea was filed in the office.

Comyn now shewed cause, and contended that there was no irregularity in this case. The defendant had pleaded the general plea of bankruptcy, and it had been held yesterday that a plea of bankruptcy ought to be delivered and not filed. (*b*) In this case the plea was filed in the office; that was irregular, and therefore the plaintiff was entitled to sign judgment.

Reader in support of his rule said, he was not aware of any case in which it had been held that a general plea of bankruptcy must be delivered. In *Tidd's* Practice (*c*) it was laid down, that bankruptcy, among other pleas, need not be signed or filed, but *may* be delivered to the plaintiff's attorney, but it did not say that it *shall* be delivered. The practice he believed, certainly, had been not to deliver such pleas.

ABBOTT C. J. The Master says the plea must be *delivered* and not *filed*, and therefore we must decide according to the practice of the Court.

Reader said that his client had given a rule to reply, before the plantiff had signed judgment. He had an

(*a*) 5 *Geo.* 2. c. 30. s. 7.

(*b*) Vide *Rowsell* v. *Cox*, ante 211.

(*c*) 6 Ed. 713.

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HENDERSON *against* SANSUM.

affidavit of merits, and therefore upon payment of costs, pleading instanter and taking short notice of trial, probably the Court would set aside the judgment.

The COURT made the rule absolute on these terms.

Friday, Feb. 12th.

SMITH *against* BLUNDELL.

Defendant cannot try by proviso, till plaintiff has been in default. Issue being joined in the cause for the Summer Assizes 1816, when it was not tried, and the case having gone down to trial again at the Summer Assizes 1818, upon a different issue, but not having been tried as intended, by a special jury, neither party choosing to pray a *tales*: Held that the plaintiff was not in such default as to entitle the defendant to a rule for trying by proviso. (a)

D. F. JONES on a former day obtained a rule calling on the defendant to shew cause why the rule obtained for trying this cause by proviso should not be discharged. The affidavit in support of the rule stated, that issue was joined in *Trinity* Term last, and the cause went down to trial at the summer assizes for Chester, by special jury, but as very few special jurymen attended, neither party chose to pray a *tales*, and consequently the cause was not tried. Since then, the defendant applied for a rule to try by proviso.

Parke now shewed cause against the rule, and urged, that prior to the case going down to trial at the last assizes, issue had been joined in the same cause for the summer assizes 1816; and the plaintiff not choosing then to go to trial, he submitted there was sufficient

(a) The defendant cannot proceed to trial by proviso until the plaintiff has been guilty of laches in not proceeding to trial according to the course and practice of the Court. See 2 *Saund.* 336. a. n. 4. 2 *East.* 209, Sir *Jacob Banks's* case. 2 *Salk.* 652. except in cases where the defendant is an actor, as in replevin, &c. *id. ibid.* See rule *Mich.* 4 *Ann.* note c. "no trial can be had by proviso in *London* or *Middlesex*, till default made by the plaintiff after the issue is entered on record, nor in country causes till the plaintiff has made default in trying his issue the next assizes after the issue is entered, and in neither case till a rule for a trial by proviso be entered. Vide *Staffordshire* Canal Company *v.* The *Trent* and *Mersey* Navigation Company, 5 *Taunt.* 577. 1 *Marsh*, 218. S. C. *Tidd*, 6th ed. 818.

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SMITH *against* BLUNDELL.

default on his part to entitle the defendant now to a rule for trying by proviso.

Jones, on the other side, said it was true that issue was joined in this case in *Trinity* Term 1816, and that notice of trial had been received for the then next assizes, when the plaintiff did not try; but the issue then to be tried, was not the issue now on the record, but a totally different issue, and it became so in consequence of the defendant's having applied to add a fresh plea, so as to alter the whole record. Under these circumstances the plaintiff was not in default, and therefore he was entitled to discharge the rule for trying by proviso.

ABBOTT C. J. This application is made on the ground, that issue was not joined in this case until *Trinity* Term last, and consequently that the plaintiff has not been in default. It is sworn distinctly, that the issue which the plaintiff relied upon at the last assizes was not the one he relied upon at the summer assizes 1816. The defendant does not deny that issue was joined in last *Trinity* Term, and therefore as there is no default on the part of the plaintiff, I think we ought to make this

Rule absolute.

1819.

Friday, Feb. 12th.

Affidavit must state in the jurat the day on which it is sworn.

Doe *v.* Roe.

CAMPBELL moved for judgment against the casual ejector, but stated an omission in the affidavit of the service of the declaration in ejectment, the jurat having omitted to state the day of the month on which the deponent was sworn. He submitted that it was not necessary to reswear the affidavit, but merely for the commissioner to insert the day of the month according to his recollection of the time when the oath was administered.

Holroyd J. said that the jurat must either be amended, or an affidavit produced on the part of the commissioner as to his recollection of the day when the affidavit was sworn

Rule refused.

Friday, Feb. 12th.

Service of declaration in ejectment upon a woman on the premises, who represented herself to be the wife of the tenant in possession, insufficient, because the affidavit of service did not aver the deponent's belief of the fact. (a)

Doe *on the demise of* Simmons *against* Roe.

CHITTY moved for judgment against the casual ejector, on an affidavit stating the service of the declaration upon a woman on the premises, who represented herself to be the wife of the tenant in possession, but as the affidavit did not go on to add "which deponent verily believes to be true,"

The Court held this insufficient, and therefore refused the rule.

Rule refused.

(a) Service on the wife of the tenant in possession, either upon the premises or at the husband's house (so that the husband and wife appear to be living together) is sufficient; and if the wife neglect to deliver the declaration to her husband, he must answer for her default. *Doe* dem. *Morland* v. *Bayliss*, 6 *T. R.* 765. *Doe* dem. *Baddam*, v. *Roe*, 2 *Bos. & Pul.* 55. *Goodright* v. *Thrustout*, 2 *Bla.* Rep. 800. *Goodtitle* v. *Badtitle*, 1 *Bos. & Pul.* 384. *Jemmy* v. *Cutts*, 1 *Bos. & Pul.* New Rep. 308.

1819.

HARTLEY *against* BARLOW.

Friday, Feb. 12th.

Attachment for contempt in not paying money pursuant to the Master's allocatur, cannot be supported on an affidavit stating a demand of the money by a clerk. (a)

CHITTY shewed cause against a rule for an attachment against an attorney of this Court, for his contempt in not paying the sum of 200*l.* to the plaintiff, pursuant to the Master's allocatur. The answer to the application was, that the affidavit upon which the rule had been obtained was only made by the plaintiff's clerk, who swore that he demanded the money, but did not shew any authority, by power of attorney or otherwise, to receive it, or that he had produced such power.

Holt, in support of the motion, admitted that it did not appear that the deponent had any power of attorney.

ABBOTT C. J. A mere clerk will not do. You must shew him in contempt by refusing to pay the money himself to the principal, before you can charge the party with an attachment.

Rule discharged.

(a) A copy of the rule with the Master's allocatur thereon, should be personally served on the party liable to the costs; and at the same time the original rule should be shewn. The *King* v. *Smithies*, 3 *T. R.* 351. 3 *Taunt.* 485. *Tidd.* 1026, and a demand of payment made, *id. ibid.* So in order to ground an attachment for nonperformance of an award, it is not sufficient to shew facts from which it may be inferred that the award has come to the hands of the party proceeded against. *Brander* v. *Penleage*, 5 *Taunt.* 813. There must be personal notice of the award, and a personal demand of the money; and the naming of a particular time and place in the award, does not supersede the necessity of a personal demand, which is absolutely necessary in order to bring the party into contempt. *Brandon* v. *Brandon*, 1 *Bos. & Pul.* 394. 2 *Saund.* 186. note 1. 1 *Salk.* 83. 12 *Mod.* 257, 312. If the demand be made by a third person, a copy of the power of attorney should be served upon the opposite party. Per Lord *Kenyon*, *H.* 38 *Geo.* 3. *K. B.* *Tidd.* 881. But see 2 *Bla. Rep.* 990.

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PAGE *against* VOGEL and ANOTHER.

Where plaintiff does not declare within the Term of which writ is returnable, defendant is in general entitled to an imparlance; but *aliter* where delay in declaring is occasioned by defendant himself, as by his unnecessarily obtaining an order for particulars, with a stay of proceedings until they have been delivered. (*a*)

CURWOOD shewed cause against a rule obtained in this case on a former day for setting aside the interlocutory judgment signed for irregularity, on the ground that the defendant was entitled to an imparlance. The writ was returnable early in *Michaelmas* Term, time enough for the plaintiff to have declared as of that Term, but he did not declare until after the essoign day of the present Term; and on shewing cause *Curwood* said that if there were no other circumstances in the case but those stated, the defendant would be entitled to an imparlance; but he contended that the delay of the plaintiff should be a voluntary delay, or that if the defendant delayed the plaintiff, and prevented him from declaring, as for instance, by obtaining an injunction, then the defendant was not entitled to an imparlance. He suggested that the circumstances of the delay in this case arose from the act of the de-

(*a*) The general rule seems to be, that where the writ is returnable in one Term, but the declaration is not delivered or filed, and notice thereof given before the essoign day of the second Term, the defendant is not obliged to plead in the same Term, but is entitled to an imparlance, except where bail is not perfected. *Imp. K. B.* 8th ed. 265. From Rule *Trin.* 5 & 6 *Geo.* 2. n. b. Rule *Mich.* 10 *Geo.* 2. reg. 2. and Rule *T.* 22 *Geo.* 3. K. B. it appears, that when the process in K. B. is returnable the last return of the Term, or when the process is returnable before the last return, but the declaration is not delivered or filed, and notice thereof given four days exclusive before the end of the Term, the defendant, if completely in Court, is entitled to an imparlance, and need not plead until the first four days of the next Term; and if the plaintiff omit delivering or filing his declaration before the essoign day of that Term, and giving notice thereof, the defendant will also be allowed to imparl to a subsequent Term. 2 *Saund.* 2, note 2, 4th ed.; *Tidd,* 6th ed. 483. Where the defendant does not perfect bail, and thereby prevents the plaintiff from declaring in chief, he is not entitled to an imparlance, as the plaintiff on bailable process is not bound to declare *de bene esse. Kent* v. *Yates,* 6 *Taunt.* 261; 1 *Marsh,* 587, sc.; *Bailey* v. *Hantler,* 2 *Bos. & Bul.* 126; *Rolleston* v. *Scott,* 5 *T. R.* 372; *Imp. K. B.* 8th ed. 266; *Tidd,* 483.

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PAGE *against* VOGEL.

fendant himself, for as soon as the plaintiff had sued out his writ, and before he had declared, the defendant obtained the usual order for a particular of the plaintiff's demand, with a stay of proceedings till that was given. This was an action by the assignees of a bankrupt for goods sold to the defendants—the bankrupt had absconded, and his books had also disappeared, therefore they could not furnish the particular. It appeared that the plaintiff had called upon the defendant himself before the commissioners of bankrupt, and he admitted that he had an account of all his dealings with the bankrupt in his books, and that he had all the bills of parcels of the goods sold to him, with which he undertook to furnish the plaintiff, but, notwithstanding that undertaking, he and his attorney had constantly refused to give them copies of the bills of parcels, so that in point of fact the defendant himself had tied up their hands from giving him correct particulars, the knowledge of which he had within himself. Under these circumstances the plaintiffs had declared, and they gave such particulars as they were enabled to do, and in consequence of the defendant having refused to plead, the plaintiffs signed judgment as for want of a plea. The question therefore was, whether under these circumstances the defendant was entitled to an imparlance, the judgment having been regularly signed.

F. Pollock in support of the motion relied upon the general rule of the Court, that where a plaintiff does not declare in one Term, the defendant is entitled to imparl to the next.

The COURT said that this rule was not without exception. If the defendant was the cause of the delay, he was not entitled to an imparlance. It appeared that he himself had stopped the plaintiff from going on, and therefore the judgment was not irregular. He might

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however be let in to plead upon payment of costs, pleading *instanter*, and taking short notice of trial.

Rule discharged on these conditions.

Friday, Feb. 12th.

PICKER *against* WEBSTER.

Rules for judgment as in case of a nonsuit in country causes, should be applied for early in an issuable Term, in order that the plaintiff may have sufficient time to shew cause in the same Term, or the Court will enlarge the rule till the next Term, and will not permit the parties to discuss the rule at chambers. (a)

TINDALL applied to enlarge the rule in this case for judgment as in the case of a nonsuit, on the ground that the application was made so late in the Term that it was impossible for the plaintiff, who resided in the country, to prepare his instructions to shew cause.

HOLROYD J. said that the rule must be enlarged, but said that parties ought not to move for judgment as in case of a nonsuit in country causes so late in an issuable Term, the necessary consequence of which must be to delay the proceedings until another issuable Term.

Rule enlarged.

(a) The time for moving for judgment, as in case of a nonsuit in a country cause, seems to be in the Term next after notice of trial is given. *Tidd*, 6th ed. 823. (note *Hall* v. *Buchanan*, 2 *T. R.* 734.) In another case on the same day, the counsel for the plaintiff and defendant had consented to enlarge the rule to shew cause ten days after the Term. But the Court said, in cases of motions to set aside executions, and other instances requiring an early decision, a hearing at chambers may be obtained; but motions for judgment, as in case of nonsuit made late in the Term, are not entitled to any such favourable attention, and must be enlarged till the next Term.

1819.

DOE on the demise of SIMONS against MASTERS.

Friday, Feb. 12th.

Motion for leave to issue execution against the casual ejector, where the landlord defends alone, is only a rule to shew cause. (a)

MANNING moved for leave to issue an execution against the casual ejector, after a verdict against the landlord, who defended the ejectment alone; and he submitted that he was entitled to have the rule absolute in the first instance, on the authority of *Fenn* v. *Marriott*. (b) He also mentioned, that *Chitty* in the course of the Term had made a similar application, and had obtained a rule absolute in the first instance.

Chitty said that he had certainly moved for the rule in that manner, but that a rule *nisi* was drawn up, and afterwards, upon an affidavit of service on the landlord, who had defended, was made absolute without opposition.

ABBOTT C. J. The only use in moving the Court is to give the party an opportunity of shewing cause why execution should not be issued; therefore the rule ought not to be absolute in the first instance. You may find in *Barnes* rules absolute for any thing.

Rule to shew cause granted.

(a) See *Doe* dem. *Roberts* and Wife v. *Gibbs* and Wife, ante 47.
(b) *Barn.* 185.

1819.

Friday, Feb. 12th.

Gun *against* Honeyman.

Rule for special jury must be served a reasonable time before the day of trial; and where a cause stood for trial at sittings in Term, and after rising of the Court, the day before the time of trial, defendant served plaintiff with a rule for a special jury, and, notwithstanding, the cause was tried by a common jury; Held that proceedings were regular. (a)

LITTLEDALE moved to set aside the verdict obtained by the plaintiff in this case at the last sittings in this Term at Guildhall before Abbott C. J. with costs, on the ground of irregularity, the irregularity being that the plaintiff had tried the cause by a common jury, notwithstanding a rule for a special jury had been served upon him.

Barrow now shewed cause against the rule for setting aside the verdict, and he stated that the rule for the special jury was served upon the plaintiff after the rising of the Court on the 6th of *February*, and the cause stood in the paper for trial at *Guildhall*, at half past nine the next morning. When the cause came on, he mentioned the circumstances to the learned Judge, that a rule for a special jury had been served on the plaintiff the evening before, but his Lordship directed the trial to proceed with the common jury pannel annexed to the record, and accordingly the plaintiff had a verdict. Under these circumstances, he submitted that the verdict could not be disturbed, because the rule for the special jury was not served in sufficient time to enable the plaintiff to strike the jury.

Littledale in support of this rule said, that this was simply a question of regularity. By the practice of the Court, the rule for the special jury is to be drawn up and served in *London* and *Middlesex* on or before the day preceding the adjournment day after each Term. If this rule applied to sittings after Term, it equally ap-

(a) See the next Case.

1819.

GUN *against* HONEYMAN.

plied to sittings in Term. The plaintiff had conformed to the rule thus laid down by Mr. *Tidd*, (a) and therefore he was regular. There was no other rule upon the subject, and therefore until the Court pronounced some other rule it was impossible to say that this was irregular.

ABBOTT C. J. It is not necessary to lay down any other rule than that which common sense dictates. It is sufficient however to say, that the rule for the special jury ought to be served so long before the day appointed for the trial of the cause as will afford the party an opportunity, with the ordinary dispatch of business, to attend to the striking of the jury. Here it is quite obvious that the plaintiff had not sufficient notice of this rule, by which we ought to say he should be bound.

BAYLEY J. Common sense pronounces the rule in this case. The defendant has notice of trial for a particular day, and he is informed that it will be tried by a common jury, unless a special jury is struck. Service of the rule for a special jury the night before the trial takes place is manifestly not sufficient. The rule must be served a sufficient period of time before the trial, so as to enable the party to strike the jury before the trial takes place.

HOLROYD J. and BEST J. concurred.

Rule discharged.

Barrow and *Dehany* for the plaintiff, and *Littledale* for the defendant.

(a) *Tidd*, 6th ed. 840, 1, and see id. 862. By Rule H. 44 *Geo.* 3. "it is ordered by Lord *Ellenborough*, C. J. that in future no cause shall be tried by a special jury in *Middlesex* or *London*, unless the rule for such special jury be served, and the cause marked in the marshal's book as a special jury, on or before the day preceding the adjournment day in *Middlesex* and *London* respectively." 10 *East* 1; 2 *Campb.* XII. *Tidd*, 6th ed. 862. Special jury causes are appointed for particular days, and perhaps this was the reason why the rule was promulgated, and not with a view to any arrangement between the parties themselves.

1819.

Friday, Feb. 12th.

Doe *on the demise of* Lorimer *against* Lorimer.

Where an ejectment by original was appointed for trial at the last sittings in Term, and the defendant obtained a rule for a special jury, the Court refused to discharge the rule on the ground that it was obtained too late, because the plaintiff could not obtain judgment as of the present Term, supposing he had succeeded. (a)

THIS was an ejectment by original, and notice of trial was given for the third sittings in this Term. A rule for a special jury was obtained on the part of the defendant on the 8th instant, and the cause was appointed for trial on the 9th. On a former day, *Chitty* obtained a rule calling upon the defendant to shew cause why the rule for a special jury should not be discharged, upon an affidavit stating these facts, and alleging that there was not any possible defence to this action.

Gurney now shewed cause, and urged that the plaintiff could gain nothing by this motion, because the proceedings being by original, he could not get judgment of the present Term; and therefore the only ground upon which the motion could be sustained, viz that of unjustifiable delay, completely failed.

Chitty, in support of the rule, referred to the decision in the last case, and contended that this was not a case to be tried by a special jury.

Abbott C. J. I should have thought so too, if the case could have been tried with effect in this Term. If the plaintiff had proceeded to trial on the 9th, and ob-

(a) The practice of the Court of Common Pleas is, not to discharge the rule for the special jury; but where delay is suggested as the motive for the application for a special jury, and this is not satisfactorily denied on the part of the person applying, the Court will direct the cause to be tried at the sittings in Term, unless consent is given to such terms as will obviate the objection of delay; and giving judgment of the Term is not, it is said, always satisfactory, *Bloxam* v. *Brown*, 4 *Taunt*. 470. *Tidd*, 6th ed. 842. 7 *Taunt*. 390.

tained a verdict, the proceedings would not have been set aside; but as he did not think fit to do so, we cannot now interfere.

1819.

DOE against LORIMER

Gurney then consented to waive the trial by a special jury, and *Chitty* obtained leave to withdraw the record and re-enter it so as to prevent the cause being tried on the next day.

The KING *against* the SHERIFF OF MIDDLESEX.

Friday, Feb. 12th.

Attachment against sheriff is regular where bail is put in with filacer of wrong county; but the Court directed that upon payment of costs the attachment should remain in the office, in order that bail might be put in with the proper filacer (a)

ON a former day a rule was obtained for setting aside an attachment against the sheriff, in a cause of *Dowgel* v. *Pollock*, which had issued on the ground that bail had been put in with the filacer of *London* instead of *Middlesex*.

Reader now shewed cause, and contended that the attachment was regular, and could not be set aside, inasmuch as the bail put in in *London* was no bail to process issued in *Middlesex*.

Tindal, in support of the rule, said the application was merely to the indulgence of the Court, and was *bonâ fide* on behalf of the bail, who would ultimately

(a) Where bail were put in in *Middlesex* on an original sued out in *London*, the Court held that it was the same as if no bail at all had been put in, and the plaintiff might and ought to have proceeded against the sheriff for that default, *Harris* v. *Calvert*, 1 *East*. 603. The plaintiff cannot proceed by *scire facias* against the bail in the wrong county, when such bail is not warranted by the previous proceedings, *id. ibid.* But where the defendant was arrested on a *testatum capias* in *Kent*, the original being issued in *Middlesex*, and bail was put in in *Kent*, that county being inserted in the bail-piece, but in the margin these words "*Testatum* from *Middlesex*," the Court held the proceedings regular, and set aside the attachment obtained against the sheriff. The King v. the Sheriff of *Middlesex*, 3 *M.* & *S.* 532.

1819.

The King *against* The Sheriff of Middlesex.

have to pay the debt, as the sheriff had nothing but the body of the defendant; he therefore prayed that the rule, calling upon the coroner to return the writ, might be stayed upon payment of costs, in order that in the mean time proper bail might be put in above.

The Court directed the attachment to remain in the office for ten days, as a security for debt and costs; but in failure of the defendant putting in bail above with the proper filacer, the attachment to go.

Rule enlarged.

Friday, Feb. 12th.

Braithwaite *against* Brown.

Writ of error is a supersedeas from the time of its being allowed, without any notice given; but where defendant has wilfully concealed the issuing of the writ of error from the plaintiff, the Court will set aside an execution afterwards issued without costs, and on terms that no action shall be brought. (a)

CHITTY on a former day obtained a rule calling on the plaintiff to shew cause why the execution in this case should not be set aside for irregularity, the irregularity being that a writ of error had been allowed two days before the execution issued. The affidavit upon which the motion was made, stated that the action was brought upon a bill of exchange accepted by the defendant, who let judgment go by default. On the 13th of *January* the defendant's attorney attended the Master to tax the costs, in pursuance of the notice served by the plaintiff's attorney, but the latter did not keep the appointment, and the Master would not tax the costs. Another appointment was served for the following day, but the defendant's attorney was prevented from attending the taxation by other business. The costs were however then taxed, and a *fi. fa.* was issued and executed. The defendant had brought a writ of error, which was allowed on the 13th of *January*, and the affidavit swore that the plaintiff's attorney was aware of the

(a) See the next Case.

1819.

BRAITHWAITE *against* BROWN.

allowance of the writ of error, because the deponent had met him on the day it was allowed, when the latter charged him with having brought a writ of error.

Adolphus shewed cause against the rule, and admitted that in general a writ of error operates as a supersedeas from the moment of allowance, though the plaintiff be proceeding at a distant place in ignorance of the allowance; (*a*) but the question was, whether the defendant's attorney, by keeping the fact secret of his having brought a writ of error, and permitting the plaintiff to go on without giving him any intimation of error having been brought, would not deprive the defendant of the benefit of the present motion. It was true that there was no positive declaration that the writ of error was brought for delay, but the plaintiff's attorney swore as to his belief that it was brought for that purpose, and certainly the presumption was very strong in favour of that belief, from the circumstance of the defendant's attorney having attended to tax the costs. (*b*) It was distinctly sworn that the defendant's attorney had been served with an appointment for one o'clock at the Master's office, but at the suggestion of the defendant's attorney the appointment was allowed to stand for 2 o'clock; but when the plaintiff's attorney attended the Master, he was informed that the defendant's attorney had been there, and had entered a caveat; the Master, however, said he would give another appointment for the morrow,

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(*a*) *Hawkins* v. *Jones*, 5 *Taunt.* 204. and see the cases collected, *Tidd*, 6th ed. 1172, 3. See the full argument in *Meriton* v. *Stevens*, *Willes* 270. In that case the expression in the books "*execution executed*" is explained to mean, that if the sheriff has actually *seized* goods under an execution before the writ of error was allowed, he may afterwards proceed to a sale.

(*b*) The mere *belief* of the plaintiff or his attorney, that a writ of error is brought for delay, is not sufficient to prevent it from operating as a supersedeas. *Kempland* v. *Macauley*, 4 *T. R.* 437. 3 *T. R.* 78. *Christie* v. *Richards*. *Cleghorn* v. *Ireland*, *Tidd*, 550.

when the defendant's attorney did not think proper to attend. It was true in point of fact that a writ of error had been sued out before, and was in the possession of the defendant's attorney, but the attorney for the plaintiff denied all knowledge of this fact at the time he attended the Master. Under these circumstances, the defendant's attorney having kept the allowance of the writ of error in his pocket which he might have served, and so much address and dexterity having been shewn on the other side, the Court in all events would not make the rule absolute with costs.

Chitty in support of the rule said that the plaintiff had refused to withdraw the execution, although he had been informed that the writ of error had been allowed; and therefore as the defendant had been obliged to apply to the Court, the rule, he trusted, would be made absolute with costs.

The COURT said, that under the circumstances of the case the *fi. fa.* ought to be set aside without costs, the defendant undertaking to bring no action. (*a*.)

Rule absolute without Costs.

(*a*) As to these terms, see ante 134.

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——— *against* BUTLER.

Friday, Feb. 12th.

Where the allowance of a writ of error was obtained at 20 minutes past 11 in the forenoon, and execution issued at 20 minutes after one in the afternoon, and notice of the allowance given after the issuing of the execution; *Held* that the writ of error operated as a supersedeas. (*a*)

THIS was an application to stay the proceedings pending a writ of error. The allowance of the writ of error was obtained at twenty minutes after eleven in the forenoon, and the *fieri facias* was issued at twenty minutes after one of the afternoon of the same day, and the question was, whether after notice for the taxation of costs for the same day the writ of error operated as a supersedeas, the plaintiff having been served with notice of the allowance of writ of error after the *fieri facias* issued.

Bolland for the plaintiff, and *Reader* for the defendant.

The COURT said, that under the circumstances stated the proceedings ought to be stayed.

Rule absolute.

(*a*) See the last Case.

MARTIN *against* FRANCIS.

Friday, Feb. 12th.

The defendant having been discharged out of custody of the sheriff, with the consent of the plaintiff, notwithstanding a notice from the plaintiff's attorney to the sheriff's officer, of his requisition not to release the defendant until the costs were paid; the Court held that the sheriff was not liable to pay those costs, nor bound to detain the body of the defendant after the plaintiff was satisfied. (*a*)

ON a motion, calling on the sheriff of *Middlesex* to shew cause why he should not pay the plaintiff's attorney £7. 11. 0. together with the costs of the appli-

(*a*) As to the lien of an attorney on the costs, see *Tidd*, 6th ed. 329, 330. In *Taylor* v. *Brander*, 1 *Esp. Rep.* 45. it was held that the sheriff is not bound to discharge a defendant, unless he receive a written discharge from

1819. MARTIN *against* FRANCIS.

cation. The facts sworn to were these: The defendant was arrested at the suit of the plaintiff upon a bill of *Middlesex*; and the plaintiff in the action having discharged defendant, the latter was liberated by the sheriff, notwithstanding a notice from the plaintiff's attorney not to discharge him until his costs were paid, amounting to £7. 11. 0. There had been no notice given to the defendant by the attorney, not to pay the debt and costs to the plaintiff without the attorney's knowledge, nor did it appear that there was any collusion between the sheriff and either of the parties. Under these circumstances this rule was obtained, calling on the sheriff to pay the attorney's costs and the costs of the application.

Holt now shewed cause, and said, that the question which the Court were now called upon to decide was, whether the plaintiff's attorney had a lien upon the body of the defendant for his costs, after he had been discharged at the suit of the plaintiff. He contended, that this was an attempt to extend the doctrine of lien beyond what had ever been claimed before. An attorney certainly had a lien upon papers belonging to a party

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the plaintiff, and that after receiving such discharge he might detain the party a reasonable time to search the office for other writs against him; that twenty-four hours is not to be considered an unreasonable delay, and that the officer is not bound to make the search until the written discharge arrives. In C. P. a plaintiff may compromise the action without consulting his attorney, if there be no connivance to cheat the attorney of his costs, and where the plaintiff received the debt, and a certain sum towards the costs, and the fact was communicated to the attorney, who nevertheless proceeded to execute a writ of inquiry, and signed final judgment; the Court set aside the proceedings, *Chapman* v. *Haw*, 1 *Taunt.* 341. The plaintiff's attorney cannot proceed with a cause without the consent of his client, after payment of the debt, and part of the costs, for the purpose of recovering the remainder of the costs, to which his right is doubtful, *Charlwood* v. *Berridge*, 1 *Esp. Rep.* 345. But if a defendant after action brought pay the debt to the plaintiff without the knowledge of the attorney, and without discharging the costs, the plaintiff has a right to proceed in the action for the recovery of them, *Jones* v. *Powell*, 7 *East.* 536. 6 *Esp.* 40 sc.

1819.

MARTIN *against* FRANCIS.

for his costs, but this was the first time that ever a lien had been claimed upon the body of a defendant, and the Court would not recognize a principle so dangerous to the liberty of the subject. It was clear that the plaintiff had a right to discharge his debtor without the authority of his own attorney. If the sheriff had authority from the plaintiff to discharge his prisoner, that was quite sufficient for the former, and he was not bound to take notice of the attorney's claim for costs. He relied on *Wythers* v. *Henley* (*a*) as a decisive authority upon this subject. In the present case, it was not suggested that there was any collusion between the defendant and the plaintiff, and there was no notice given to the defendant not to pay the debt and costs to the plaintiff, and therefore it was a naked question, whether the plaintiff's attorney had a lien upon the defendant's body for his costs.

Chitty, in support of the rule. When an attorney takes upon himself the conduct of a cause, there is an implied undertaking on the part of his client to pay him an adequate compensation for his labour; and when he succeeds, his remedy is against the adverse party, who, as a legal consequence of the suit, is to pay certain costs, and until he pays those costs he cannot be discharged. It is a known rule that bail cannot, after notice of an attorney's lien, settle an action without apprizing the attorney of the proceedings. (*b*) The sheriff is not bound, upon the plaintiff's giving him a discharge, to liberate the defendant; and until the sheriff obtains a *supersedeas*, he is not liable to an action for false imprisonment, and therefore any detention until a *supersedeas* issues would be perfectly legal where there is sufficient notice to him that the defendant has not satis-

(*a*) *Cro. Jac.* 379. (*b*) 2 New Rep. 99. *Tidd*, 6th ed. 330.

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MARTIN *against* FRANCIS.

fied all legal demands in the action for which he is detained. The only legitimate mode of compelling the defendant to pay the costs of the proceedings against him, is to give notice to the sheriff that the attorney has a lien against the defendant for his costs. This course has been pursued in the present case, for the plaintiff's attorney gives notice to the sheriff not to discharge the defendant, because he has a lien against him; but in defiance of that notice the defendant is discharged. If the plaintiff colludes with the defendant or with the bail, and settles the action by taking part payment of the debt without the intervention of the attorney, the Court will not restrain the latter from proceeding against the bail, notwithstanding such settlement. (*a*) If this principle were not to hold, in every case the parties would settle the action amongst themselves, and the attorney would probably lose his costs. In the present case, the sheriff's officer having received notice that the plaintiff's attorney had a lien for his costs, it was incumbent on him, before he discharged his prisoner, to see that the defendant settled those costs. [*Bayley* J. If the attorney misrepresents the case to the sheriff, and says he has a lien, which he has not, is the sheriff to retain the defendant at the peril of having an action for false imprisonment brought against him?] The sheriff is not liable to an action of false imprisonment until a *supersedeas* issues. Where the sheriff voluntarily discharges the party, after an express notification that the attorney has a lien against the defendant, the sheriff would be clearly liable to discharge the attorney's demand. The plaintiff is not to have the benefit of the process against the defendant, which puts him in a situation to procure the payment of his debt, and then leave the attorney to seek his costs from some other

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(*a*) *Tidd*, 6 ed. 329, 330. *Doug*. 1st ed. 100, 226. 2d ed. 104, 238.

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MARTIN *against* FRANCIS.

quarter. The sheriff, therefore, is not at liberty to discharge the defendant at the instance of the plaintiff only. [*Bayley J.* You say there must be a writ of *supersedeas*, in order to subject the sheriff to an action for false imprisonment for subsequent detention?] In a case tried before Lord *Ellenborough*, his Lordship held that an action for false imprisonment will not lie against the sheriff until a regular *supersedeas* issues. In that case the sheriff would not give up the body of the party, and it was held that the action for false imprisonment would not lie until a *supersedeas* issued; but it was said that a Judge's order would be sufficient for that purpose. [*Bayley J.* The sheriff is not bound at his peril to believe that the attorney's demand for costs is well supported.]

Wilde, amicus Curiæ, said that in the case alluded to by *Chitty* the action was brought for refusing to discharge the defendant after a Judge's order for that purpose.

ABBOTT C. J. I am quite satisfied that we ought not to impose any burthen upon the sheriffs, such as is now sought, whether the attorney has a lien or not; and that the body of the defendant cannot be detained if the plaintiff is satisfied.

The rest of the Court concurred.

Rule discharged.

1819.

Friday, Feb. 12th.

JAMES *against* KIRK.

Parties may apply to the Court to discharge the order of a Judge at chambers; but where plaintiff gave notice of trial for assizes, and afterwards countermanded, and then applied for an order to amend declaration in slander, in the inducement stating the transactions in relation to which the words were uttered, and the order was obtained on the terms of defendant's having imparlance till next Term; the Court refused to rescind the order by depriving defendant of a right to imparl. (*a*)

THIS was an action for slander, alleged to be spoken by the defendant of the plaintiff, touching certain transactions between the plaintiff and one *Edward Rawlins*. The defendant pleaded the general issue, and notice was given for trial at the last assizes for the county of *Kent*; but a short time previous to the assizes the plaintiff's attorney discovered that, owing to a defect in the original instructions, the nature of the transactions between the plaintiff and *Edward Rawlins* was erroneously alleged in the declaration, and that therefore he could not proceed to trial without the declaration being amended, and there not being sufficient time to obtain an order for that purpose, the Judges being then on the circuit, he countermanded the notice of trial. Shortly before last Term, the plaintiff's attorney laid the declaration, with further instructions, before counsel, in order that it might be amended, but he was not able to obtain the declaration as amended until lately. An application was then made to Mr. Justice *Best*, for leave to amend the declaration and issue delivered; and his Lordship made an order for that purpose, on payment of costs to be taxed by the

(*a*) In *Wright* v. *Stevenson*, 5 *Taunt.* 850. C. P. the Court reprobated the practice of making an application to one Judge at chambers, which had already been refused by another Judge at chambers; but said that if the parties were dissatisfied with the order of a single Judge, they ought immediately to apply to the Court. An amendment of the plaintiff's declaration does not necessarily entitle defendant to plead *de novo*, but only where the amendment alters the state of the defendant's case, *Woodroffe* v. *Watson*, 6 *Taunt.* 400. The general rule is, that if the amendment be in matter of substance, or after plea pleaded, the plaintiff must pay costs or give an imparlance, at the election of the defendant. Rule *Mich.* 10 *Geo.* 2. *reg.* 2. note b. 2 *Stra.* 950. *Tidd.* 6 *ed.* 752.

Master, allowing the defendant also to imparl until next Term. The alterations and amendments in the declaration related only to the nature of the dealings and transactions between the plaintiff and *Edward Rawlins*, and the application of the slanderous words to those dealings; but the slanderous words alleged were the same in both declarations. On a former day a rule was obtained, calling on the defendant to shew cause why so much of the order of Mr. Justice *Best*, above mentioned, as related to the imparlance until next Term, should not be rescinded.

Comyn now shewed cause against the rule, and said, that the Court were now called upon to revise the order of a Judge who had heard all the circumstances of the case at chambers. [*Abbott* C. J. They have a right to do that.] Admitting that the plaintiff had a right to open this question again, it was clear from the facts of the case stated on the affidavits that there was no pretence for granting this motion. The action was brought in *Hilary* Term last, the general issue was pleaded, and notice of trial was given for the summer assizes, but the plaintiff upon application to the Judge at chambers obtained leave to declare *de novo* upon payment of costs, and giving the defendant an imparlance until the next Term. The plaintiff therefore having amended his declaration so as to materially alter the substance of it, the defendant, upon every principle of good sense and justice, was entitled to an imparlance until the next Term. Admitting therefore that the order of Mr. Justice *Best* was not conclusive, the Court would upon this statement of facts alone give the defendant an imparlance until the next Term.

Chitty, contrà, contended, that the amendment made in the declaration could not alter the defendant's plea

1819.

James *against* Kirk.

of the general issue, because there was not a word in the declaration altered with respect to the slanderous matter. The alterations related only to the nature of the dealings and transactions between the plaintiff and *Edward Rawlins*, and the application of slanderous words to such dealings—the original declaration having stated that the plaintiff had sold certain hides and goods of *Edward Rawlins*, whereas in fact the plaintiff had bought the hides and goods of that person. This alteration could not make any difference in the plea, because the defendant could only plead the general issue. The alteration was only in the introductory matter, but the slanderous words were the same. [*Best* J. The alteration in the introductory matter might materially influence the defendant as to the plea he should put upon the record, because, as the declaration originally stood, the plaintiff might be nonsuited upon the general issue; but the introductory matter being altered, the defendant might possibly be able to prove a justification. The defendant would have a right to say, "You have now hit upon a statement to which my proofs are applicable, and now I will justify." There is no objection certainly to the case standing over to another assizes, if the defendant wished to plead a special plea.]

Abbott C. J. This is an application by the plaintiff, to set aside part of an order obtained by himself. He was the person applying to the learned Judge for the order to amend his declaration on the terms imposed of giving defendant an imparlance until the next Term, as the price of the indulgence. He need not have taken an order at all, but he thought fit to take it himself. The circumstance of a Judge having made an order at chambers is certainly no reason why the same question should not be reconsidered by the Court. It might

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JAMES *against* KIRK.

happen to be extremely fit that an order made by a Judge at Chambers should be rescinded or wholly discharged. But in order to do that, it is incumbent on the party to suggest to the Court sufficient grounds to induce them to do so. In the present case, no sufficient ground appears to me to be suggested for altering the order of my Brother *Best*; and therefore this rule must be discharged with costs.

Rule discharged with Costs.

The KING in the Case of WALKER *against* WHALEY; and ——— M'EVOY *against* M'INTOSH.

Friday, Feb. 12th.

Motion for habeas corpus to bring up the body of the sheriff (on a return by coroner of *cepi corpus* to an attachment) before a Judge at chambers is of course, and made without affidavit.

IN these cases, the coroner having returned *cepi corpus* to writs of attachment against the sheriff of *Middlesex*, and this being the last day of Term,

Dowling moved for writs of *habeas corpus* to bring up the bodies of the sheriffs before one of the Judges at chambers, to answer to such matters as should be there alleged against them. These motions were made without affidavit.

Ballantyne, in the course of the same day, made a similar application; and the writs were severally directed to issue.

END OF HILARY TERM.

CASES

PRINCIPALLY

ON

PRACTICE AND PLEADING,

AND RELATING TO THE

OFFICE OF MAGISTRATES,

DETERMINED

IN

The Court of King's Bench,

IN

Easter Term,

In the Fifty-ninth Year of the Reign of GEORGE III.

1819.

TURNER *against* LEWIS.

Wednesday, April 28th.

A new trial will be granted in trespass for cutting down trees, though the damages were under 20*l.* if the object of the action be to try a right of a permanent nature. (*a*)

GURNEY, for defendant, moved for a new trial, on the ground that the verdict was against evidence and the opinion of the learned judge before whom

(*a*) So the Court will grant a new trial where the sum found by the verdict amounts to the precise sum of 20*l.* *Dyball* v. *Duffield*, *Mich.*T. 1818. *Tuesday* 10 *Nov.* *Frere* Serjt. moved for a new trial after a verdict for the plaintiff for the exact sum of 20*l.* *Abbott* C. J. inquired whether, according to the rule of the Court, the sum found by a verdict ought not to *exceed* 20*l.* in order to become the subject of a new trial? or whether the rule is, that a new trial shall be refused when a verdict is found for less than 20*l.* The Master, on being referred to, said that there was no prescribed rule of Court upon the subject;

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TURNER *against* LEWIS.

the cause was tried. It was an action of trespass for entering the plaintiff's close and cutting down trees, with a common count for carrying trees away. Defendant pleaded the general issue and *liberum tenementum*, which was denied in the replication. The question upon the trial was as to the exact line of boundary in a fence between the plaintiff's and the defendant's land, and whether the trees were on the plaintiff's or the defendant's side of such line; and the jury, after a view of the *locus in quo*, found a verdict for the plaintiff for 7*l.* the value of the trees cut down and taken away by the defendant.

The COURT, after inquiring what was the amount of

and *Frere* referred to *Tidd's* Practice, 6th ed. 932, and mentioned the case of *Taylor* v. *Green*, as determining when the sum to be recovered is *under* 20*l.* the Court consider the action as too trivial to authorize the granting of a new trial; and in the present case, as the damages amounted to the sum of 20*l.* the Court granted the rule *nisi*.

The Court has frequently refused to grant a new trial where the action has appeared to be frivolous, as in *Macrow* v. *Hull*, 1 *Burr.* 11, where Mr. Just. *Foster*, who tried the cause, reported it to be an action of trespass extremely frivolous, but sufficiently proved. He said that the defence was a very strong one in mitigation of damages, but yet was not a sufficient denial of the trespass, so that in strictness the verdict was against evidence. But he considered the action so trifling, frivolous, and vexatious, that he should have thought sixpence damages would have been enough; whereupon a new trial was refused. So in *Farewell* v. *Chaffey*, 1 *Burr.* 54, though the verdict was against evidence, a new trial was denied upon the nature of the action, the value of the matter in dispute, and other circumstances of the case, and Lord *Mansfield* said a new trial ought to be granted to attain real justice, but not to gratify litigious passions upon every point of *summum jus*. And see *Bruton* v. *Thompson*, 2 *Burr.* 664. *Reavely* v. *Mainwaring*, 3 *Burr.* 1306. *Marsh* v. *Bower*, 2 *Bla.* Rep. 851. *Norris* v. *Tyler*, *Cowp.* 37. *Tidd*, 6th edit. 932. But though the practice of refusing a new trial where the action is frivolous has been long established and acted upon by the Courts, yet the rule by which a new trial is refused when the damages do not exceed *the sum of* 20*l.* appears to be of recent introduction. The Court have refused to grant a new trial on behalf of the *plaintiff* on account of the smallness of the damages, *Barker* v. *Dixie*, 2 *Stra.* 1051. *Hayward* v. *Newton*, 2 *Stra.* 940. *Anon.* 2 *Salk.* 647. *Mauricet* v. *Brecknock*, *Dougl.* 509. But in these cases, although the damages were under 20*l.* the general rule, that no trial will be granted when the sum is under that amount, does not appear to have been adverted to. In C. P. it seems also to be a rule, that a new trial will not be granted where the amount is under 20*l.* *Fitzsimons* v. *Inglis*. 5 *Taunt.* 537.

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the damages found by the jury, and ascertaining that they were under 20*l.* suggested that the smallness of the damages might afford an answer to the application; but, upon *Gurney's* observing, that, as the action was brought for the purpose of trying a right of a permanent nature, and which might become the subject of future litigation, this case was not affected by the general rule that a new trial is not to be granted where the damages are under 20*l.*, the Court assented to that proposition, and granted a

Rule nisi.

Thursday, April 29th.

LEE *against* THURSTON.

A *cognovit* given by a defendant in custody under *mesne* process is valid, although no attorney be present on the part of the defendant, unless it be shewn that some undue advantage was taken of him. (*a*)

CHITTY moved to set aside the judgment and the execution thereon, on the ground that the defendant whilst in the custody of a sheriff's officer upon an arrest on *mesne* process executed the *cognovit* upon which the judgment and execution were founded, without an attorney on his behalf being present. He submitted that this was contrary to the rule of 15 *Car.* 2. (*a*),

(*a*) By rule, *East.* 15 *Car.* 2. *Reg.* 2. it is ordered, "That no bailiff or sheriff's officer shall presume to exact or take from any person, being in his custody by arrest, any *warrant to acknowledge a judgment*, but in the presence of an attorney for the defendant, which attorney shall then subscribe his name thereunto, which said warrant shall be produced when the said judgment shall be acknowledged; and if any bailiff or sheriff's officer shall hereafter offend, or do contrary wise, he shall be severely punished for so doing. And it is further ordered, that no attorney shall from henceforth acknowledge or enter, or cause to be acknowledged or entered, any judgment, by colour of any warrant gotten from any defendant being under arrest, otherwise than as aforesaid." The rule in C. P. is in the same words Rule *Hil.* 14 and 15 *Car.* 2. *Reg.* 4; but in that Court it has been held, that where a defendant is arrested, and executes a *cognovit* while in custody, for the amount of the debt and costs, such a *cognovit* is invalid, unless an attorney is present on the part of the defendant. *Webb* v. *Aspinall.* 1 *Moore's* Rep. 428. It does not appear from this case, that the terms of the rule of Court were particularly adverted to. In K. B. there is another rule, by which it is declared that no *warrant of attorney*, executed by any person in custody of a sheriff or other officer *for the confession of judgment*, shall be valid unless there be present some attorney on the behalf of such person in custody, to be expressly named by him, and attending at his request, to inform him of the nature and effect of such

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if not to the rule of 4 *Geo.* 2.; and he cited *Parkinson* v. *Caines*, (a) *Smith* v. *Burlton*, (b) and *Tidd*, 586. 575; *Imp. Prac. K. B.* 486. *Imp. Prac. C. P.* 467. A *cognovit* was within the spirit of the rule of 15 *Car.* 2; the object of that rule being to prevent persons under imprisonment from being prevailed upon to enter into improvident terms as a condition of their liberation. The terms "*any warrant to acknowledge a judgment*" in the rule of 15 *Car.* 2. import any authority to *sign a judgment*, and are not limited or confined to the instrument technically termed a warrant of attorney. The rule was made to protect those who were not in a condition to protect themselves, and there is as much danger of oppression in permitting a *cognovit* to be given by a prisoner without the intervention of an attorney on his behalf, as in the case of a warrant of attorney

warrant of attorney before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof. Rule, *East.* 4 *Geo.* 2. K. B.—7 *T. R.* 7 *Imp.* K. B. 486. *Tidd*, 573. But it does not appear that any such rule exists in C. P. and in that Court, where the attorney present on the part of the defendant was a total stranger to him, and introduced by the plaintiff's attorney, the warrant of attorney was holden to be good. *Osborne* v. *Davis*, 4 *Taunt.* 797. An attorney's presence is not necessary where a warrant of attorney is given by a defendant in custody under process of execution, *Crompton* v. *Steward*, 7 *T. R.* 19. *Birch* v. *Sharland*. 1 *T. R.* 715. nor when given to a third person, at whose suit the defendant is not in custody. *Smith* v. *Burlton*, 1 *East.* 241. *Churchy* v. *Rosse*. 5 *Mod.* 144. Regularly, it seems, a *cognovit*, which is a confession of the *action*, cannot be given before declaration, the cause of action not being expressed in the process, and therefore when a compromise takes place before declaration, it is said the proper course is to take a warrant of attorney, *Tidd*. 6 *Ed.* 585. but in the case in 1 *Moore*, 429, it was held by the Court of Common Pleas, that as it is the constant practice of that Court to allow judgment to be entered up on a *cognovit*, on the supposition that a declaration has been either filed or delivered, the Court would decide in conformity to that practice. And in K. B. leave has been given to file a bill against an attorney, *nunc pro tunc*, when judgment had been signed at the request of the attorney, to save expense, without filing a bill, on a *cognovit* which he had given, *Walker* v. *Woolley*, 7 *T. R.* 207. Giving a *cognovit* will preclude defendant from objecting to an irregularity in plaintiff's not having filed common bail in time, according to the statute, *Davis* v. *Hughes*, 7 *T. R.* 206. As to the effect of bankruptcy, after a *cognovit* given, see *Vansandon* v. *Crosbie*, *ante* 16. The *Court* will set aside a *cognovit* which has been obtained by fraud, *Doe* v. *Franklin*. 7 *Taunton*, 9.

(a) 3 *T. R.* 616. (b) 1 *East.* 241.

to confess a judgment, because it is taken from the party in custody, who is anxious to get his liberty: in both cases the prisoner is precluded from investigating the demand of the creditor, and is liable to an immediate execution. The judgment of *Lawrence* J. in *Crompton* v. *Steward*, 7 *T. R.* 20. and of Lord *Kenyon* in *Smith* v. *Burlton*, 1 *East*, 243. shew that the principle of the rules of Court apply to a case of this nature. The case of *Parkinson* v. *Caines* appears to be a decisive authority. Interlocutory judgment having been signed against a prisoner in custody of the Marshal, the plaintiff's attorney took a *cognovit* from him for 200*l.* with a defeasance on paying 49*l.* the real debt and the costs, but no attorney was present on the part of the defendant. Though this case was not strictly within the rule of the 15 *Car.* 2. which only mentions prisoners in the custody of the *sheriff's* officers, yet the Court after consulting the Master interfered for the relief of the defendant.

ABBOTT C. J. In the rule of 4 *Geo.* 2. the words are "warrant of attorney executed." A warrant to confess a judgment is a very different thing from the act of confessing. A warrant of attorney is only an authority to sign judgment; but a *cognovit* amounts to an actual confession: a warrant to acknowledge is not the same thing as an actual acknowledgment. If there is no case cited where the Court has put the construction upon these rules, which is now contended for, I do not see any reason for our extending the construction.

BAYLEY J. The case of *Parkinson* v. *Caines* does not decide that a *cognovit* and a warrant of attorney are the same thing. It was contended there, that the rule only applied to the case of a prisoner while in the custody of a bailiff or sheriff's officer, whereas the defendant was in custody of the marshal; and secondly, that it

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only applied to a warrant of attorney, and not to a *cognovit*. It is there reported, that the Court after consulting the Master, said that the case was not strictly within the rule, and that in the instances to which the rule did not apply, each case must depend on its own particular circumstances; and that where a case of oppression was established by the affidavits, they would interfere so as to guard against the acts of designing persons, or men who were under the pressure of distress and imprisonment. It appears to me that in the present case a *cognovit* is not strictly within the rule, and that we cannot enlarge its construction; and as the affidavits did not show that any undue advantage had been taken of the defendant, there was no ground for the application.

HOLROYD J. and BEST J. concurred.

Rule refused.

Thursday, April 29th.

PHILLIPS *against* WHITEHEAD.

The Court will not stay proceedings on a bail bond on payment of costs where a trial has been lost, except on the terms of the bail bond's standing as a security, even where defendant has surrendered. *Quære*, Whether the same practice would not now prevail in case of an attachment against the sheriff. (*a*)

COMYN moved, that the proceedings against the bail upon the bail-bond might be stayed on payment of costs, without the bail-bond standing as a se-

(*a*) See the cases *Tidd*, 293, 307; 1 *Sel.* Prac. 1st ed. 181. But where an *attachment* against *the Sheriff* was set aside on the ground that the principal had been surrendered, the Court decided that the attachment should not stand as a security, although a trial had been lost, *Nias* v. *Gray*. *Mich.* T. 57 *Geo.* 3. (last day of term.) ' *Espinasse* showed cause against a rule obtained by *Holt* to stay the proceedings on an attachment, on payment of costs, on the ground that the principal had been surrendered. It appeared that a trial had been lost, and therefore it was insisted that the attachment ought to stand as a security. *Holt* contra, urged that the rule did not apply where the defendant was a prisoner, and here the affidavit stated that he had rendered, and it was said that the same point had been lately determined by the Court in a case in which *Comyn* was engaged, who said it had been so held; and in the principal case the Court held that the attachment ought not to stand as a security. From MS. of Mr. *Espinasse*; but see *Hill* v. *Bolt*, 4 *T. R.* 352. *Tidd*, 307. and *semble* that the reasons assigned in the above case of *Phillips* v. *Whitehead* are equally applicable to the case of an attachment.

The technical expression "*lost a trial*," or "a term," signifies that, by the neglect of the defendant to perfect bail in due time, the plaintiff has

curity, although a trial had been lost. From the affidavits it appeared that the defendant was arrested upon a Bill of *Middlesex*, returnable upon the first day of last term. Bail was given to the sheriff, and the plaintiff delivered a declaration, but the bail above were opposed and did not justify. The plaintiff then took an assignment of the bail-bond, and issued writs against the bail, which were returnable on the last day of the Term. A few days previous to the present Term, the defendant, then in the rules of the *King's Bench* prison, upon another action, came to the chambers of the Chief Justice, upon a *habeas corpus*, and rendered in this action in discharge of his bail. Notice was given to the plaintiff's attorney, and a summons was taken out to shew cause why the proceedings on the bail-bond should not be stayed. On the first day of the present Term, the attorneys attended before HOLROYD J., at his chambers, who held that as the plaintiff had lost a trial, the bond must stand as a security for the debt. The ground of the present application was, that as the plaintiff had the body of the defendant, which was all that he was originally entitled to, the bail ought

been prevented from trying his cause in and obtaining judgment of the term in which the writ was returnable, *Hill* v. *Bolt*, 4 *T. R.* 352. note *a.* The *King* v. Sheriff of *Surry*, 5 *Taunton*, 606. The plaintiff, therefore, in opposing the rule for setting aside the proceedings on a bail-bond or an attachment, must shew distinctly in his affidavit the time when his writ was returnable, and that he used due means to expedite the cause. The practice originally was, that the plaintiff must have declared *de bene esse*, *Ward* v. *Alderton*, Prac. Reg. 71. but it was afterwards decided otherwise, 2 *Strange*, 1262, 1 *Sellon*, 1st ed. 183. But according to the last decision in the Common Pleas, and the present practice in the King's Bench, the plaintiff must show that he declared as soon as in his power, 5 *Taunt.* 606. See the Practice in general, 1 *Sellon*, 1st ed. 181 to 184, and post. Where the bail-bond is to *stand as a security*, the bail have an opportunity of trying the merits, but like bail in error, they are ultimately liable for the debt, and cannot surrender their principal, nor will they be discharged by his bankruptcy and certificate, 1 *Sellon*, 183. But by the present practice of both Courts after judgment against the principal, the bail are entitled to a rule to plead, demand of plea, &c. before judgment against them, *Evans* v. *Surman*, 1 New Rep. 63. 1 *Sellon*, 182. *Tidd.* 294.

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to be discharged. It was true that a trial had been lost, as the plaintiff had declared against the defendant time enough to have the cause tried at the Sittings after last Term; but even if the plaintiff had recovered judgment, he could only have taken the defendant in execution, and therefore he could not be injured if the bail were now released. The plaintiff had the highest security he could have in satisfaction of his debt, and was not entitled to the double security of the person and the bail-bond.

Per Curiam. There seems to be no ground for this application. There is no distinction in principle between an application to set aside the proceedings upon the bail-bond, on the ground of the surrender of the defendant by the bail, and an application of the same kind, on the ground of the defendant having put in and perfected bail. There can be no distinction, because the plaintiff has the security of the body in both instances:—for in one instance, the defendant is within the walls of the prison; and in the other, he is in the custody of the bail, which is merely a change of custody. It is the same in point of law, whether the plaintiff has the body of the defendant in the custody of the Marshal, or in the custody of the bail. The render in this case, under the circumstances stated, has the effect of making the plaintiff declare *de novo*; and although he appears to have got a double security, still he does not get it until after he has lost a trial, and until after bail had been put in. The trial has been lost by not rendering the defendant in time. There seems, therefore, to be no reason why the plaintiff should be deprived of the security of the bail-bond.

Holroyd J. When this case came before me at chambers, I was told that this point had been ruled in a case which was to be found in the Term Reports. I sent

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for the case referred to, but it did not appear there, that the plaintiff had lost a trial. (*a*) Another case was also mentioned, in which it was stated, that that fact appeared; but upon looking at the affidavit the statement appeared to be without foundation. The question seemed to me to be this,—whether, the bail-bond being forfeited, the defendant could, by rendering after the plaintiff was entitled to the benefit of the bond, take away that benefit from him. The Court have taken away the benefit where no trial has been lost, upon payment of the costs of the proceeding on the bail-bond; but in no case have they done so where a trial has been lost. We cannot deprive the plaintiff of the benefit of the complete right he had, before the render, of proceeding upon the bail-bond, and it is but reasonable that in such case, after a trial has been lost, the bail-bond should stand itself as a security for the debt. (*b*) The time for rendering the defendant before the assignment is gone by, and the bail-bond is forfeited. The only question is, therefore, whether we can take away any benefit from the plaintiff except by putting him in the same situation in which he was before. I think we cannot.

Rule refused.

(*a*) See *Measey* v. *Cavell*, 5 *T. R.* 534.

(*b*) As to the effect of the bail-bond standing as a security, see *Evans* v. *Surman*, 1 New Rep. 63. Ante 271, in note.

KEARNEY *against* KING.

Friday, April 30th.

After a nonsuit on the ground of a variance in a former action, in which defendant was arrested, he may be again arrested in a second action for the same cause. (*a*)

PLATT moved for a rule for the plaintiff to shew cause why the defendant should not be discharged out of custody on filing common bail, and why upon

(*a*) In *Imlay* v. *Ellefsen*, 3 *East*, 312, Lord *Ellenborough* said, "There are many cases in the books where a plaintiff had been suffered to hold a defendant to bail a second time for the same cause of action, as where he has erroneously commenced his *action* or mistaken his remedy, and has discontinued

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entering a common appearance the bail-bond should not be delivered up to be cancelled, on the ground that the defendant had been twice arrested for the same

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it in due time without oppression or laches. And in *Molling* v. *Burkholtz*, 3 *M.* & *S.* 153, where the defendant had been arrested under a Judge's order, but was afterwards discharged by the Court on filing common bail, and was then arrested on a fresh writ for the same cause of action, it seems to have been admitted, that the second arrest was lawful, provided the former action had been discontinued, and the costs taxed and paid. So in *Keeling* v. *Elliott*, *Barnes*, 399, it is said to be settled, that the plaintiff may hold the defendant to bail in a second action, after the discontinuance of a former action, in which defendant was arrested. Where the *plaintiff* becomes bankrupt, and the action in consequence cannot be proceeded in, defendant may be again arrested in a second action at the suit of the assignees, *Barnes* v. *Maton*, 15 *East*, 631; *Davies* v. *Chippendale*, 2 *Bos.* & *Pul.* 282. It is otherwise where the defendant has been supersedable through the *plaintiff's laches;* in which case a second arrest is not allowed in an action brought by the plaintiff for the same cause of action, inasmuch as the practice of the Court, by which the time is limited for the duration of the defendant's imprisonment would be nugatory, if, after the defendant had become entitled to his discharge, he were again liable to suffer by the detention of his person for the same cause of action. *Imlay* v. *Ellefsen*, 3 *East*, 309; *Daniel* v. *Dodd*, 8 *East*, 334. So where plaintiff has improperly arrested the defendant for goods sold and delivered before the time of credit has expired, he cannot arrest defendant *de novo* for the same debt after the cause of action has accrued. *Wheelwright* v. *Joseph*, 5 *M.* & *S.* 93. A bankrupt or insolvent debtor cannot be arrested on a subsequent promise to pay a debt which accrued before the bankruptcy or insolvency. *Wilson* v. *Kemp*, 3 *M.* & *S.* 595. K. B. but see *Horton* v. *Moggridge*, 6 *Taunt.* 563. C. P. *Tidd*, 6th ed. 212, 216, 7. *Dougl.* 101, n. 42. 2 *Stra.* 1223.

Where, however, a defendant, after being arrested, pleads in abatement the nonjoinder of other contractors, he may be again arrested in an action in which all the partners are included. *Salisbury* v. *Whiteall*, *Tidd*, 178. So where defendant, on being arrested, gives a draft for part of the demand, and promises to settle the remainder in a few days, he may be again arrested on a fresh writ if the draft is dishonoured. *Puckford* v. *Maxwell*, 6 T. R. 52. Where a cause is referred to arbitration, the defendant may be arrested in an action on the award, although he was held to bail for the original debt. *Collins* v. *Powell*, 2 T. R. 756; *Daniel* v. *Dodd*, 8 *East*, 335. But a defendant cannot be arrested in an action on a judgment when he was before arrested in the original action. *Lewis* v. *Pottle*, 4 T. R. 570; *Prendergast* v. *Davis*, 8 T. R. 85; *Crutchfield* v. *Sewards*, *Barnes*, 116. Where no bail was given in the original action, defendant may be arrested in an action on the judgment, *Barnes*, 116. Where the former arrest took place abroad, or in a Court in which the methods of redress are different from that in which the second arrest is made, the second arrest is lawful, though for the same cause of action. *Wood* v. *Thompson*, 5 *Taunt.* 851, 1 *Marsh*, 395, S. C. 8 T. R. 417; *Maule* v. *Murray*, 7 T. R. 470. 2 *East*, 453, *Imlay* v. *Ellefsen;* vide *Potter* v. *Brown*, 5 *East*, 124; *Ballantine* v. *Golding*, *Cooke*, Bankrupt Law, 515; *Folliott* v. *Ogden*, 1 *Hen. Bla.* 123; *Smith* v. *Buchanan*, 1 *East*, 6.

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cause of action. The first action had been tried, and the plaintiff was nonsuited on the ground of a va-

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If first action were not bailable, though it be pending, plaintiff may arrest in a second action for same cause.

Davison v. *Cleworth, Hil.* T. 1818, *Jan.* 24. In this case the plaintiff had sued out serviceable process against the defendant, which the latter moved to set aside on the ground of irregularity in the manner in which it was served. Before a rule absolute had been obtained, the plaintiff sued out bailable process for the same cause of action, and caused the defendant to be arrested thereon. *Jones* now moved for a rule, calling on the plaintiff to show cause why defendant should not be discharged out of custody on filing common bail, on the ground of his having been arrested after a former action had been brought for the same cause. He alluded to the maxim that *nemo debet bis vexari, pro eâdem causâ*, and cited the cases of *Belifante* v. *Levy*, 2 *Stra.* 1209. 4 *Burr.* 2502. He admitted that the case of *Bishop* v. *Powell*, 6 *T. R.* 616. appeared somewhat against him, but he contended it was distinguishable from the present, for here the Court were in possession of the action, whereas in that case the first cause had proceeded no farther than the issuing of process. He contended *that bailable process* could not be issued when another action had been instituted, and the Court were in possession of it. *Abbott* J. The cases in 2 *Strange*, 1209. and 4 *Burr.* 2502. are different from the present, for there the defendant was first sued by bailable process, and here only by common. In *Bishop* v. *Powell*, the Court refused to discharge the defendant, in the second action. *Bayley* J. Have you any case to show that a person can be discharged from arrest on the principle that *nemo debet bis vexari, pro eâdem causâ*, where there has not been a previous arrest? Here he has not been twice vexed. In the first action, the defendant sustained no personal inconvenience; he was not arrested nor bail required, and therefore he might well be arrested afterwards. Lord *Ellenborough* C. J. You have your plea in abatement that another action is subsisting, if the facts will warrant such a plea, but this rule must be refused.

Where a defendant is let out of custody at his own request, to give him an opportunity of attending to his business, he may be again arrested on the same affidavit.

PENFOLD v. MAXWELL, *Mich. T.* 1816, *Nov.* 28. *Gaselee*, on a former day, had obtained a rule to shew cause why the defendant should not be discharged out of custody, on filing common bail, under the following circumstances: The plaintiff, on the pressing application of the defendant's wife, permitted him to go out of the custody of the sheriff, in order that he might attend to an office which he held under government. At a subsequent time the plaintiff issued an *alias testatum capias*, grounded upon the original affidavit, to hold to bail, by virtue whereof the sheriff again arrested the defendant, and took him into custody. *Puller*, on shewing cause, cited the case of *Puckford* v. *Maxwell*, 6 *T. R.* 52. which he urged was precisely in point; and *Gaselee*, in support of the rule, contended that a fresh affidavit was necessary. Lord *Ellenborough*, Ch. J. It is very advisable that we should lay down no rule which would have the effect of inducing parties to keep persons in custody, for great inconvenience might arise from it to the prisoner. Great inconvenience would follow from its being laid down as law, that if a plaintiff did let the defendant out of custody, he should not be able to retake him without a fresh affidavit.—Rule discharged. It is otherwise, however, with respect to process of *execution*, for a defendant who has been discharged out of custody on an execution, with the consent of the plaintiff, cannot be retaken, even in

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riance, (*a*) and he submitted that this was sufficient to entitle the defendant to his discharge from the present action, and he cited *Imlay* v. *Ellefsen*. (*b*)

The COURT however said, that to entitle the defendant to his discharge, it must appear that the second action was brought vexatiously. Here there was no ground for complaint of vexation, and therefore the rule must be refused. (*c*)

Rule refused.

pursuance of an agreement to that effect between the plaintiff and defendant. *Blackburn* v. *Stupart*, 2 *East*, 243. *Clarke* v. *Clement*, 6 *T. R.* 525. 1 *B.* & *A.* 297.

(*a*) *Ante* 28. (*b*) 3 *East*, 309. (*c*) Vide *Brown* v. *Davies*, *ante*. 161.

Friday, April 30th.

CARTER *and* OTHERS, ASSIGNEES *of* MINCHIN *and* OTHERS, *against* HART.

Where defendant has been arrested in an action brought in the name of a bankrupt by the authority of his assignees, he cannot be afterwards arrested at the suit of the assignees for the same cause of action, unless the first action has been discontinued, or the costs paid. (*a*)

G. *MARRIOTT* moved to discharge the defendant out of custody on filing common bail, on the ground that he had been arrested by the plaintiffs for

(*a*) Vide *ante* 215. In general an action must be discontinued, and the costs taxed and paid, before the defendant can be arrested a second time for the same cause of action, *Molling* v. *Buckholtz*, 3 *M.* & *S.* 153. and see 4 *Campb.* 214; 1 *Stark.* 49. S. C.; *Bristow* v. *Heywood*. In *Barnes*, Assignee of *Saunders* v. *Maton*, 15 *East.* 631. it was held that where the plaintiff became bankrupt after the commencement of an action, a second action may be brought by the assignees, and defendant may be arrested, although he was held to bail in the former suit. Where the first action is not brought *by the assignees* in the name of the bankrupt, it should seem that a new action may be commenced in their name, without discontinuing and paying the costs of the former, as they may then be considered as strangers to the first arrest. In *Webb* v. *Ward*, 7 *T. R.* 296. it was held that an uncertificated bankrupt bringing an action of trover for goods for the benefit of his assignees, should be compelled to give security for costs, *Bass* v. *Clive*, 3 *M.* & *S.* 283. but that decision has been questioned, 6 *Taunt.* 123. 1 *East.* 432. (*a*) It is clear that the action cannot be proceeded in in the name of the bankrupt, if the defendant plead the bankruptcy, *Kinnear* v. *Tarrant*, 15 *East.* 622. and in the case of *Minchin* v. *Hart*, *ante* 215. where the plaintiff having become

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the same cause of action on which he had been previously arrested at the suit of the bankrupts, and that the action brought in the name of the bankrupt had not been discontinued, nor the costs taxed or paid.

HOLROYD J. granted the rule, subject to the production of an affidavit, that the first action which was brought in the name of the bankrupts had been instituted by the direction or with the concurrence of the assignees.

Rule granted.

bankrupt before plea pleaded, the defendant obtained an order for giving security for costs, and afterwards pleaded bankruptcy, it was held that the plea could not be set aside, but that the order for giving security for costs should be rescinded.

DOE *against* COTTERELL.

Saturday, May 1st.

In support of an application to set aside a verdict, and proceedings for irregularity, on the ground that the record varied from the issue, it must appear by the affidavit that the declaration also did not correspond with the record. *Semble*, that it is irregular, without leave of the Court or a Judge, to pass the record, differing in a material respect from the declaration and issue. (*a*)

CAMPBELL moved to set aside a verdict for the plaintiff on the ground of irregularity, upon an affidavit stating that the record of *Nisi Prius* varied

(*a*) In the case of *Randole* v. *Bailey*, 1 *M.* & *S.* 232. where the clerk of the errors in C. P. in transcribing the record, by mistake entitled it generally when the declaration was entitled specially, and error was assigned thereon, after which he amended the transcript, by inserting the special memorandum, the Court refused to restore the transcript to the state in which it stood at the time when the plaintiff in error assigned his error. The record of *Nisi Prius* is supposed to be transcribed from the issue roll, and ought to contain an entry of the declaration and pleadings, and the issue or issues joined thereon with the award of the *venire facias*, as in the issue or paper book, see *Tidd*, 6th ed. 858. but it has been held that if the record of *Nisi Prius* agrees with the declaration, a variation from the issue is not material;—as if the declaration be on a bond dated 1728, and in the issue the date of the bond is alleged to be of 1738, the record of *Nisi Prius* may state the bond to have been dated in 1728, as it was to a bond of that date that the defendant pleaded. *Shepley* v. *Marsh*, 2 *Stra.* 1131. So in *Thompson* v. *Simmons*, *Barnes*, 475. it was moved to set aside a verdict on the ground that the record of *Nisi Prius* differed from the issue book delivered, the defendant's

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from the issue delivered in a material respect. The premises in the declaration in the issue being described as situate in the parish of *Wimpledon*, and the record in the parish of *Wimpleton*. It was urged that the record of *Nisi Prius* ought to correspond with the issue, and that if there be a mistake in the issue it is not competent to a plaintiff without leave of the Court or of a Judge to rectify the mistake by making the record correct, for which was cited *Ethersay* v. *Jackson*. (a) That the defendant in this case was induced to proceed to trial in consequence of the delivery of the issue which described the premises to be situate in a wrong parish, and which circumstance defendant was advised would be a ground of nonsuit. That it must be intended that the issue corresponded with the declaration, and that consequently there was no proceeding to warrant the record, and that if plaintiffs were permitted without leave thus to pass a record varying in so material a respect from the antecedent proceedings, there would be no limit to the alterations which might be introduced on the record, and that defendants at *Nisi Prius* would be thus taken by surprise.

The COURT after inquiring whether there was any

name being inserted in the paper book, in joining issue, instead of the plaintiff's, whereas in the record the plaintiff's name was inserted and the issue properly joined; but the Court refused to make any rule, two issues having been joined, and a general verdict found, and see *Leeman* v. *Allen*, 2 *Wils.* 160; *Mather* v. *Brinker*, id. 243. In *Combe* v. *Pitt*, 3 *Burr.* 1682. where a new trial was moved for on the ground that the plea roll contained nothing but the declaration and the plea of *nil debet*, when it was contended that a plea in abatement before pleaded ought to have been entered; the Court held that at all events the irregularity was cured by the defendant's accepting the issue. So that if there be any variance in the *issue* from the pleadings delivered, or other irregularity in making it up, the defendant's attorney or agent should not accept the same, but take out a Judge's summons, and obtain an order for setting it right; as he cannot otherwise take advantage of the irregularity, either on a motion in arrest of judgment, or a motion for a new trial, *Tidd*, 6th ed. 777. *Mather* v. *Brinker*, 2 *Wils.* 243. 2 *Bla.* Rep. 816, 7. *Shepley* v. *Marsh*, 2 *Stra.* 1131. *Thompson* v. *Tilla*, *id.* 1266.

(a) 8 *T. R.* 225.

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affidavit stating that the declaration did not correspond with the record, and being answered in the negative, said, that as there was no such affidavit stating positively that the declaration was not correct, they must infer that it did correspond with the record. That if the issue varied from the declaration, it was incumbent on the defendant to return it within a reasonable time after he received it, and that as the defendant had not ventured to swear that the declaration was defective, the inference was that it was correct, aud consequently the ground of the application failed, and they refused to give time for obtaining another affidavit relative to the defect in the declaration.

Rule refused.

BOULCOT *against* HUGHES.

Tuesday, May 4th.

A peremptory undertaking to try at the Sittings after *Hilary* Term, issue having been joined in the previous *Easter* Term, was discharged on payment of costs of application, it appearing that the trial had been prevented by plaintiff's attorney's absconding. *Semb.* That after such delay, bail might be relieved on their application; but the Court refused to discharge the bail at instance *of defendant.* (*a*)

CHITTY on a former day had moved to discharge a peremptory undertaking to try this cause at the Sittings after last *Hilary* Term, on an affidavit stating, that the plaintiff's attorney had become insolvent about

(*a*) The practice relating to the giving a peremptory undertaking for trying causes takes its rise from the statue 14 *Geo.* 2, c. 17. and is a branch of the law relating to judgment as in case of a nonsuit. Slight causes are in general sufficient to excuse the plaintiff in not bringing an action on to trial, so as to discharge the rule *for judgment as in case of a nonsuit,* as the absence of a material witness; the insolvency of the plaintiff, *Fisher* v. *Hancock, Tidd,* 824, K. B.; the insolvency of the defendant, *Douglas,* 671; *Baker* v. *Sydee,* 7 *Taunt.* 181; or the plaintiff's illness and inability to instruct his attorney, *Clarke* v. *Gorrill, Barnes,* 313, C. P. But in these cases an affidavit of the facts constituting the excuse is usually required, and an undertaking to try at the next sittings or assizes, or the motion for judgment, as in case of nonsuit, will be made absolute. The absence of documentary evidence is a sufficient ground for opposing the rule for judgment as in case of a nonsuit, and the nature of the documents need not be disclosed in the affidavits *Greenhill* v. *Mitchell,* 6 *Taunt.* 150. But in opposing the rule on the ground of the absence of a material witness, the name of the witness should be stated

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the time when the cause should have been tried, and had left the country, which occasioned the delay in trying the cause.

id. ibid. So if the plaintiff defers proceeding in order to await the decision of a similar question in another cause, the question raised, and the action in which it arises should be stated, to enable the Court to judge of the sufficiency of the excuse, *Wynn* v. *Bellman*, 6 *Taunt.* 122; and see *Mullings* v. ——, 5 *Taunt.* 88. But great precision in an affidavit of this nature is not usually required, and where the affidavit merely stated that the reason why the cause was not tried, was, that it was not convenient for a material witness to come to town in time for the trial, after it was sworn that an attempt had been made to subpœna him, the Court said, although the affidavit was loose, yet as this was the plaintiff's first default, the defendant ought to be content with a peremptory undertaking, *Wheeler* v. *Stevens*, *Hil.* T. 1819, K. B. *Abraham* for plaintiff, *Chitty* for defendant. When any of these grounds exist, to excuse the plaintiff's delay in not proceeding to trial, the rule for judgment as in case of a nonsuit is in general discharged, on the plaintiff's undertaking to try at the next sittings or assizes, 6 *Taunt.* 150. 1 *East.* 555. 7. *T. R.* 178. In K. B. such an undertaking is required, although the trial is deferred on account of the absence of a material witness, and it is doubtful whether the witness will return in time to try the cause at the approaching sittings or assizes; but although the undertaking is given, further time may be obtained, if necessary, on application to the Court.

In order to discharge a motion for judgment, as in case of nonsuit, a peremptory undertaking to try must be given by the plaintiff, and if at the appointed time the plaintiff is still prevented from trying, he must apply to the Court to enlarge the time. Aliter in C. P.

Hacker and another, Assignees, &c. v. *Hardy*, *Trin.* T. 1814, *June* 14. In this case, *Gifford* showed cause against a rule which had been obtained by *Scarlett*, for judgment as in case of a nonsuit. It appeared from the affidavit produced on showing cause that the plaintiffs were in expectation of procuring the testimony of a material witness, and it was suggested by *Gifford* that the Court would not compel the plaintiffs to enter into the usual peremptory undertaking, as it was uncertain whether they would be able to get the witness in time to enable them to comply with the terms of such an undertaking. *Sed per Bayley* J. The plaintiff must give a peremptory undertaking, and if at any future time they can show to the Court any fair ground for their interference, they may apply for further relief. This rule can only be discharged on a peremptory undertaking being given.—Rule discharged accordingly.

In C. P. if witnesses are absent, and the time of their return is doubtful, the Court will discharge the rule for judgment as in case of a nonsuit, without requiring a peremptory undertaking, *Gardner* v. *Moses*, 1 *Taunt*, 118. Vide 6 *Taunt.* 150. And in K. B., where the plaintiff had become insolvent after issue joined, this was allowed to be good cause against judgment, as in case of a nonsuit, and the Court would not bind him down to a peremptory undertaking; it being alleged that his creditors were about to decide whether they would prosecute or abandon the action. *Tidd.* 824. And when the defendant has procured the cause to be staid by injunction, the Court will not compel the plaintiff to give a peremptory undertaking.

When defendant has delayed cause by injunc-

Anon Easter Term, 1816, *May* 27th, *Pollock* having obtained a rule, calling upon the plaintiff to shew cause why judgment as in case of a nonsuit should not be given against him for not proceeding to trial, *M'Mahon* shewed

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Comyn contra insisted that as the issue had been joined in last *Easter* Term and the plaintiff had given a peremptory undertaking to try at the Sittings after last *Hilary* Term, the bail ought to be discharged, and the costs of this application paid.

Chitty resisted this suggestion, on the ground that there was no instance of bail being discharged from responsibility under such circumstances.

The COURT said that after so much delay, if there had been an application on behalf of the bail, it would have been reasonable that they should have been relieved from further liability; but as the defendant alone resisted the motion, the rule should be made absolute on the plaintiff giving a peremptory undertaking to try at the Sittings after this Term. But the Court (after consulting with the Master as to the practice) decided, that as the plaintiff had before given a peremp-

cause on an affidavit, stating, that the action was brought for a deposit on the purchase of an estate; that the defendant had filed a bill in equity for a specific performance and for an injunction; and the plaintiff had in consequence countermanded his notice of trial. It was contended therefore that the plaintiff was not called upon to give a peremptory undertaking. The *Court* were of this opinion, and *Pollock* was offered the alternative, either to have his rule discharged, or to have it made absolute, on agreeing to abandon his suit in equity and pay the costs of it.

tion no peremptory undertaking can be required.

But even the peremptory undertaking may be discharged or enlarged, on application to the Court on payment of costs, and liberty will be given to the plaintiff to try the cause at a future sittings or assizes, if a sufficient ground be disclosed by affidavit. In *Milton* v. *Terrill*, *Barnes*, 315, the Court said, "The word 'peremptory' in the rule doth not preclude the Court from a further enlargement of the time, if they think it reasonable. It is wrong to insert the word peremptory; the second excuse may be better than the first. The statute is founded on neglect. Suppose plaintiff's attorney should die by the hand of God, or the defendant should by some act of his hinder the trial? and accordingly in that case the Court enlarged the time for trial till the next assizes, on payment of the costs of the application; it appearing that the plaintiffs, who were assignees, had been delayed by the misconduct of the bankrupt in not affording the necessary information. With respect to the exoneration of bail, it has been held, that they are discharged if the plaintiff does not declare in due time, and omits to obtain a rule for time to declare, so that the cause is out of Court." *Sykes* v. *Bauwens*, 2 *New Rep.* 404,

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tory undertaking, he could not be relieved therefrom, except on the terms of paying the costs of this application.

Rule discharged on these terms.

Tuesday, May 4th.

KITCHING *against* ALDER.

Where a defendant has been arrested by a wrong name, and has given a bail-bond, and moves to set aside the writ and proceedings, the Court will require him to file common bail, and undertake not to bring any action. (*a*)

ON a former day, *Chitty* obtained a rule calling on the plaintiff to shew cause why the writ, arrest, and bail-bond should not be set aside on an affidavit that the defendant's name was *Rowland* Alder, and not *Rowley* Alder.

Manning now shewed cause and submitted that this was *idem sonans*, and consequently was not an objec-

(*a*) In *Smith v. Innes*, 4 *M.* & *S.* 360. the defendant was discharged on common bail, and the notice of declaration set aside, on the ground of a misnomer in the christian name, upon application made before the time for pleading in abatement had expired. It seems the rule must be understood with this qualification, for where the defendant has an opportunity of pleading in abatement, and neglects to avail himself of that opportunity, it is held that he cannot afterwards apply to the Court to set aside the proceedings, *Smith* v. *Patten*, 6 *Taunt.* 115. *Binfield* v. *Maxwell*, 15 *East*, 159. On a plea in abatement, if the plaintiff enter a *cassetur*, he is not liable to costs, 5 *Taunt.* 620. 15 *East*, 627. And in *Smith* v. *Innes*, 4 *M.* & *S.* 361. it appears that the Court set aside the proceedings, without costs, though, in general, on setting aside proceedings for *irregularity*, the party complained of is liable to costs, *Tidd* 541. *Hardw.* Rep. 314. With respect to the action of trespass, it was held in the case of *Cameron* v. *Reynolds*, *Cowp.* 406. that where a rule of court has given specific relief, in a case where by law the party is not entitled to two different remedies, no action can afterwards be brought for the same cause; but Lord *Mansfield* observed, "that the case before him was not like one where two different remedies are given; for instance, where an arrest is illegal, for there the court only correct the irregularity, and leave the party to bring his remedy for the false imprisonment, which the Court cannot give without consent." (The word *give* seems to be misprinted for take away.) In *Wilks* v. *Lorck*, 2 *Taunt.* 400. *Lawrence* J. observed, "that the cases go the length of shewing, that if the sheriff arrests a man who is named in the writ by another name than his true name, the sheriff will be a trespasser, and is liable to an action of false imprisonment, and perhaps the plaintiff is so likewise, and they are equally liable, whether the Court summarily interfere or not." Hence it becomes necessary to impose upon the defendant the terms of undertaking not to bring an action, 2 *Taunt.* 400. 4 *M.* & *S.* 361. *Lorimer* v. *Luke*. *Wilson* v. *Kingston*, *ante* 134.

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tion available on motion. If there were any thing in the objection as a misnomer, it might be pleaded in abatement, but the Court would not interfere in this summary way. At all events the motion was too large, because it sought to set aside the writ. The utmost indulgence that the Court would afford the defendant would be to allow him to file common bail, and at the same time impose on him an undertaking not to bring any action.

Chitty in support of the rule submitted, that as the arrest under such a writ was a trespass, for which an action would lie against the Sheriff, *Shadgett* v. *Clipson*, 8 *East*, 328. it must be considered that the writ was a nullity, and consequently no common bail would be necessary.

Per Curiam. If you apply to the Court for relief in a summary way, you must do so on equitable terms. The ordinary course is to plead in abatement; but as you desire to be relieved from the necessity of that course, in order that the defendant may not remain in prison, or put in and justify bail above, the Court will only relieve him upon the terms of filing common bail and undertaking not to bring any action.

Rule absolute accordingly, without costs.

SCOUGULL AND OTHERS *against* CAMPBELL AND OTHERS.

Tuesday, May 4th.

The Court rejected an application to amend the entry of a verdict according to the notes of an arbitrator to whom the cause had been referred, on the ground that they had no power to compel such notes to be brought before them. Entry of verdict may be amended according to the notes of the Judge, but application for that purpose must be made before the Judge, and not to the Court. (*a*)

WILDE moved for a rule to shew cause why the entry of the verdict in this case should not be amended, by entering it upon such of the breaches of

(*a*) A verdict may be amended according to the Judge's notes; but it has

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contract mentioned in the declaration as were proved according to the notes of the arbitrator to whom the case was referred. It was an action upon a contract, and the declaration assigned several breaches. At the trial before Lord *Ellenborough* at *Guildhall*, his Lordship was of opinion that the evidence offered by the plaintiff was not sufficient to sustain one of the breaches assigned. In the result, the cause was referred to an arbitrator, who received evidence *de bene esse* in support of the breach, which Lord *Ellenborough* was of opinion was not sustainable, subject to farther consideration. The arbitrator afterwards published his award, by which he directed the defendant to pay certain damages, but without expressing whether the breach in question formed any part of the subject of his consideration in making his award. The damages laid upon that breach were 2000*l.* and since then the plaintiff had brought another action upon this breach. The object, therefore, of this motion was to amend the entry of the verdict in the former cause according to the arbitrator's notes, in order that the judgment might be given in evidence in defence of the second action. But

been always held, that the application for that purpose should be made before the Judge who tried the cause, although he was a Judge of a different Court from that in which the action is brought. *Doe* v. *Perkins*, 3 T. R. 749; *Harrison* v. *King*, 1 *Barn.* & *Ald.* 163, 4; *Williams* v. *Bredon*, 1 *Bos.* & *Pul.* 320; *Eddowes* v. *Hopkins*, *Dougl.* 376, *Tidd*, 6th ed. 760-923, 4.

Graham and *another* v. *Bowham*, *Mich.* T. 1813. Nov. 10th, *Littledale* moved, that an amendment might be made in the minutes of a verdict. It was proposed that the verdict should be made conformable to the facts which had been proved and found upon the trial. Lord ELLENBOROUGH C. J. said, "The verdict can only be amended by a reference to the Judge's notes. If the amendment can be made with reference to my own notes, application must be made to me accordingly; if not, the application must be made to any other Judge by whom the notes were taken. It is impossible that such an application can be made to the Court or to any other jurisdiction than the Judge himself by whom the cause was tried. The Court have no power to compel the production of the Judge's minutes. The Court have delegated to the Judge at *Nisi Prius* a certain jurisdiction; the authority does not expire until a verdict has been taken, and it is not likely that the Court would interfere with the power of the learned Judge in hearing and determining the cause before him. The application must be made before the Judge who tried the cause." The motion was accordingly refused.

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SCOUGULL *against* CAMPBELL.

The COURT said that they had no authority to grant such a rule. Even where a party was desirous of entering a verdict according to the Judge's notes, the Court had no power to make any order upon the subject, still less to have the Judge's notes brought before the Court. The usual practice in such cases, was to go before the Judge himself, and have the verdict entered according to his notes; it was not an application to the Court. The present application was for a rule to shew cause why the verdict should not be entered according to his notes which the arbitrator was supposed to have of the case in which he made his award; of those notes the Court could know nothing, and had no means of knowledge upon the subject. They did not even know that the arbitrator had them; and therefore, as the Court could not make any order as to the notes of a Judge, still less could they make any as to those of an arbitrator.

Rule refused.

LEVY'S *Bail*.

Saturday, May 8th.

Bail cannot justify in respect of property abroad. (*a*) *Semble*.

ONE of the bail in this case offered to justify in a large sum of money, in respect of property, part in this country and part abroad, more than sufficient

(*a*) There have been conflicting decisions upon this subject. In *Graham* v. *Anderson*, 4 *M.* & *S.* 371, one of the bail, a natural born subject of *England*, was permitted to justify, partly in respect of a landed estate in *Surinam*, and partly in respect of property in England. And *Bayley* J. observed, "that the plaintiff might, by pressing the bail, compel him to render his property abroad available." But afterwards on the same day he added, "that he had looked into the cases, and that they were contradictory, and that it must not be taken for granted, that a party can justify in respect of property abroad when he has no other property." In this case, a former decision by *Dampier* J. was cited, which was as follows:—*Beardmore* v. *Phillips*, *Trin.* T. 1815, and 4 *M.* & *S.* 175. *Friday*, *May* 26. MSS. of Mr. *Merewether*, *Curwood* opposed the justification of bail. It appeared that one of the bail had property in *England* to very nearly the amount in which it was necessary that he should justify, but the rest of his property was at *Gibraltar*. *Dampier* J. inclined against the sufficiency of the alleged qualification; but on *Campbell* referring to the

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together to answer the amount in which he proposed to justify. But

BEST J. held that the bail could not be allowed to justify in respect of the property abroad; saying, that it was a general rule not to permit bail to justify under such circumstances.

case of *Christie* v. *Filleul*, 2 *Bla. Rep.* 1323, and on its being stated that the property which the bail possessed in this country was nearly sufficient to cover double the amount of the sum sworn to, the bail were allowed to justify. In *Smith* v. *Scandrett*, 1 *Bla. Rep.* 444, where one of the bail had a fortune in *Antigua* but no effects in *England*, the Court declared, that the merely having no effects in *England* was not of itself a sufficient objection without other auxiliary circumstances. In *Christie* v. *Filleul*, 2 *Bla. Rep.* 1323, it was decided, that a foreigner of credit, though he has few effects in *England*, may justify as bail, especially where the defendant is a foreigner also. But in *Boddy* v. *Leyland*, 4 *Burr. Rep.* 2526, *Yates* J. and *Aston* J. held, that landed property in *Jamaica* is not sufficient to qualify a person to become bail. *Lofft*, 34, 147. So it is said that property in *Scotland* is not sufficient, because it is not liable to the process of our Courts, 1 *Sel. Prac.* 1st ed. 161. In *Tidd's* Practice, 6th ed. 252, it is laid down, that "*foreigners* are not admitted to be bail merely in respect of property *abroad* which is not liable to the process of the Court; though it has been said, that merely having no property in *England* is not of itself a sufficient objection without other auxiliary circumstances."—With respect to a *British subject resident here*, it should seem, that the circumstance of his not having property in this country subject to the process of the Court, constitutes no objection to his becoming bail, for otherwise a person who had property in the funds, which cannot be taken in execution, would not be sufficiently qualified; and any person, between the time of his becoming bail and his being fixed with the debt, might so dispose of his property by investing it in the funds or in copyhold, or sending it out of the kingdom, as to prevent any execution against it from being effectual. But as the plaintiff may, by pressing the bail when resident here, compel him to render his property available, such a subject resident here ought to be admitted as bail. But in the case of a *foreigner*, whose domicile is abroad, the circumstance of his property being out of the kingdom, seems to constitute a reasonable objection.

Bail justified where part of his property was daily expected in a ship from Buenos Ayres, the bill of lading having already arrived.

Wilsford's Bail, *Mich.* T. 1816. *Nov.* 16. *Robinson* opposed the justification of bail, on the grounds that the bail became a bankrupt in 1810, had compounded with his creditors in 1814 for 14*s.* in the pound, and that one instalment to the amount of 2000*l.* was due from him.

Merewether stated that the bail had household furniture, &c. in this country, sufficient to cover double the amount of the debt the plaintiff had sworn to, and also that he had a ship worth 3000*l.* in the River *Plate*, which was expected very soon in this country, the bill of lading having already arrived.

Holroyd J. As the ship is so soon expected, the bail is sufficient: and he was admitted.

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LEVY'S BAIL.

Comyn for the defendant, and *Campbell* for the plaintiff.

VARDEN *against* WILSON.

Saturday, May 8th.

Bail rejected who had been bail to the sheriff in a former action, and had not been excepted to, it appearing that his property was not sufficient for both actions: but time allowed. (*a*)

WHEN one of the bail in this case came up to justify, he stated that he was bail in another action to the sheriff, and had not been excepted to; and not being aware that he was still liable, and not having property enough to justify in the present case, exclusively of his liability in the former,

BEST J. would not permit him to justify, as he was still liable in the former action, in which he had been put in as bail, and had not been excepted to; but the learned Judge allowed time to add and justify another bail.

Bail rejected, and time allowed.

Comyn for the plaintiff, and *Andrews* for the defendant.

(*a*) Vide *Rawlins's* Bail, *ante*, page 3, and note, page 2, and next case.

MITCHELL'S *Bail.*

Saturday, May 8th.

It is no objection to bail that he is one of the indorsers of the bill of exchange on which the action is brought. (*a*)

ONE of the bail in this case, which was an action upon a bill of exchange, was objected to on the ground that he was one of the indorsers of the bill; and being liable as indorser, it was contended that he ought not to be allowed to justify. But

BEST J. said this was no objection, for there might

(*a*) See *Stevens's* Bail, post, 305. In C. P. also the indorser of a bill of exchange may be bail for the drawer, in an action brought against him upon the same bill, *Harris* v. *Manley*. 2 *Bos.* & *Pul.* 526. *Tidd*, 267.

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MITCHELL'S BAIL.

be a very good defence to the action, and if the bail was a responsible man, he might justify.

F. Pollock for the plaintiff, *Comyn* for the defendant.

Saturday, May 8th.

BOLD'S *Bail*.

Bail cannot justify as a housekeeper in respect of a house which he has taken, if he has been prevented from obtaining possession by a death in the family of the former tenant. Time must be obtained for the bail to justify or time to add and justify *other* bail.

WILDE for defendant stated that one of the bail who proposed to justify as a housekeeper had quitted the house in which he formerly resided, and had taken another house, but was not yet in possession, having been prevented from immediately obtaining the same by a sudden death in the family of the outgoing occupier. It was therefore submitted, that though the bail was then in lodgings he might be allowed to justify as a housekeeper. But *per*

BAYLEY J. I think that the bail cannot conscientiously swear that he is a housekeeper. If he is likely to obtain possession in two or three days, time for him to justify may be allowed accordingly, but otherwise, two days time to add and justify must be given, and which was granted accordingly.

Saturday, May 8th.

PROBATT'S *Bail*.

Bail who had recently been bankrupt and obtained his certificate, but did not know whether his estate had paid any dividend, not permitted to justify, although now possessed of large property. (*a*)

ONE of the bail in this case on coming up to justify stated, that about two years since he had been a bankrupt, and obtained his certificate shortly afterwards, but his estate had paid no dividend to his knowledge. The defendant in this case was the petitioning

(*a*) But it has been held that bankruptcy after certificate obtained is not a ground of rejection, unless the bail has been twice bankrupt, and has not paid 15*s*. in the pound, *Smith* v. *Roberts*, *ante* 9. Where, however, a man appears to be ignorant of the state of his affairs, he has been rejected on that account, *ante* 3, and note (*b*). See next case.

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PROBATT'S BAIL.

creditor on that occasion. He now offered to justify to the amount of 4500*l.* stating that he kept a town-house and a country house. But

BEST J. held that the bail must be rejected. He said he could not permit a man to justify as bail, who kept a country-house and a town-house so recently after his bankruptcy, and who had not sufficient recollection to enable him to say whether his estate had paid any dividend.

Bail rejected.

Andrews for the plaintiff, and *Walford* for the defendant.

BENNET'S *Bail.*

Saturday, May 8th.

Bail who could not say whether during the interval of his bankruptcy and obtaining his certificate, he had or had not justified as bail, not permitted to justify. (*a*)

IN this case one of the bail had been a bankrupt, and had obtained his certificate about seven months since, but could not say whether before he obtained his certificate he had not become bail in this Court; and

BEST J. would not permit him to justify under these circumstances.

Bail rejected.

Comyn for the plaintiff, and *F. Pollock* for the defendant.

(*a*) See the two preceding cases.

VANDERMOOLEN'S *Bail.*

Saturday, May 8th.

Where one of the bail stated to the plaintiff's attorney that he did not intend to justify, but had notwithstanding come up for that purpose, the Court gave time to inquire into his circumstances, the plaintiff having been put off his guard by the bail's statement.

F. *POLLOCK* applied for time to enquire into the circumstances of one of the bail, of whom the plaintiff had had notice, on an affidavit stating that the

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VANDERMOOLEN'S BAIL.

bail, having been applied to, informed the plaintiff that he did not intend to come up to justify, but had now come up notwithstanding such statement, whereby the plaintiff had been put off his guard and did not inquire into his sufficiency.

BEST J. said he thought it was reasonable under such circumstances to grant two days time for inquiry.

Tuesday, May 11th.

WATSON *against* HINTON.

Bail, of whom notice had been given, having been rejected in another cause on the day on which they were intended to justify, were not offered for justification according to the notice, and *on next day* defendant applied for time to add and justify, and to stay proceedings against the bail below. *Held*, that this could not be done in absence of plaintiff, he being unapprized of the motion. (*a*)

NOTICE of justification of the bail in this cause had been given for yesterday, on which day they were also to have justified in another cause, but were rejected; they were therefore not called in the present cause. Counsel had been instructed to oppose them; and at the rising of the Bail-court this morning,

Wilde for defendant, applied for time to add and justify other bail, with the usual notice, upon an affidavit, stating that the defendant at the time the former notice of justification was given, believed the bail to be competent to justify. He urged that this was like the case of bail not attending on the day for which notice had been given, and that it was the constant practice for the Court to grant time in such cases, when the bail were not opposed. The defendant was ready to submit to any terms the Court would impose, and in all events place the plaintiff in the same situation, and the motion was made, in order to avoid the enormous expense to which the parties would otherwise be put between this time and to-morrow.

BEST J. said, his difficulty was this,—the bail had been rejected yesterday in one cause, and the plaintiffs'

(*a*) Vide G[illegible]ter's Bail, *ante* 42.

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counsel was instructed to oppose them in the present cause. It was not his duty to attend here to-day, and the question was, whether the Court could, behind the back of the plaintiff, make an order to stay his proceedings. He was afraid that if this indulgence were granted, it would establish a precedent likely to be attended with great public inconvenience. This application, if proper, should have been made yesterday; the defendant therefore was a day too late: and as the plaintiff was not here, either by his attorney or counsel, it would be improper to make an order behind his back, which must affect his interests.

Wilde suggested, that he had made this motion at the other end of the Hall, before the three Judges, and that they had referred him to the Bail-court.

BEST J. said he must take nothing by his motion.

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KEYS *against* TAVERNIER.

Where defendant is a prisoner, notice of justification may be given by a new attorney, without an order for changing the attorney. (*a*)

THE defendant, a prisoner, had put in and given notice of bail by *Broughton* his attorney, and afterwards, without any order for changing the attorney in the cause, gave notice of justifying added bail by *L. Williams*, a new attorney; and

Chitty opposed the justification, on the ground that such notice of justifying bail by a new attorney, without any order for changing the attorney in the cause, was irregular, and that the plaintiff was not bound to accept such notice, according to *Tidd's* Practice, and other authorities. (*a*) But, *per*

(*a*) Vide *Tidd's* P. 6th ed. 85. 2 Sir *Wm. Bl.* 1322. *Dougl.* 217. *Hill* v. *Roe*, 2 *Marsh*, 257. 6 *Taunt.* 532. Vide *ante* 81, *Wheeler* v. *Rankin*, and The *King* v. Sheriff of *Middlesex*, *post*, and see *Haggett* v. *Argent*, 7 *Taunt.* 47. 2 *Marsh.* Rep. 365, where the bail appeared and justified by their own attorney.

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KEYS *against* TAVERNIER.

BAYLEY J. That rule does not apply to prisoners who may justify bail by another attorney in order to obtain their liberty.

The bail were accordingly allowed to justify.

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ANONYMOUS.

Affidavit of justification of bail, stating the names and places of residence of the bail, but omitting to give their degree, is insufficient; but a week's time was allowed to amend. (*a*)

HOLT moved to justify bail by affidavit in this case, and mentioned a defect in the affidavit of justification, which omitted to give the addition, though it described the name and residence of the bail accurately; and he submitted that this was sufficient to entitle them to pass. But

BAYLEY J. said that the rule requiring the addition of the bail in the affidavit was inflexible, and he could not allow the justification, but gave a week's time to amend the affidavit.

(*a*) See the form of the affidavit, *Tidd's* Forms, 4th ed. 118. As to giving time to amend, see *Hayward's* Bail, *ante* p. 2.

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WEST'S *Bail*.

Affidavit for time to add and justify on ground of bail not attending, must state that he had promised to become bail, and that deponent believed him to be competent to justify. (*b*)

ESPINASSE moved for time to put in and justify another bail in lieu of one of whom notice had been given, but who had not attended this morning to justify. The affidavit upon which the motion was made omitted to state that the bail in question had "promised to become bail," and that the deponent "believed the said bail to be in sufficient circumstances as to his property to have enabled him to justify."

BAYLEY J. said that the affidavit was defective for these omissions; but when supplied, time would be given.

(*b*) Vide rule, *Mich.* 36 *Geo.* 3, *ante* 2, note (*b*). *Dixon* v. *Clarke*, *ante* 3.

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WADE's *Bail.*

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Bail who had compounded with his creditors, and afterwards became bankrupt, and had not paid 15*s.* in the pound under the commission, cannot be permitted to justify. (*a*)

THE justification of one of the bail in this case was opposed on the ground that eighteen years since he had compounded with his creditors, and that nine years afterwards he had become bankrupt, and that not having paid fifteen shillings in the pound under the commission, he was disqualified from becoming bail, inasmuch as his future effects would be liable under the statute 5 *Geo.* 2. *c.* 30. *s.* 9.

Comyn submitted that the section of the act referred to applied only where there had been two commissions of bankrupt, under the second of which fifteen shillings in the pound had not been paid.

Adams, for the plaintiff, relied upon the express words of the clause, which declare that if a commission shall issue against a person who has *previously* been discharged as a bankrupt, *or has compounded* with his creditors, he shall be protected from arrest, but his future effects shall remain liable, unless under such commission his estate is sufficient to pay 15 shillings in the pound. (*b*)

HOLROYD J. after reading the clause, thought the objection unanswerable, and refused to receive the bail, but gave two days further time to add and justify other bail.

(*a*) Vide *Smith* v. *Roberts*, *ante* p. 9. *Semble* that the bail might justify if they could swear that they were worth the necessary sum after payment of their just debts, &c. and also after payment of 15*s.* in the pound upon the debts from which they had been discharged under the commission. And see *Mountain* v. *Wilkins*, *Tidd*, 6th ed. 268.

(*b*) Stat. 5 *Geo.* 2. *c.* 30. *sect.* 9.

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JONES's *Bail.*

Affidavit of service of notice of bail by leaving it at chambers of plaintiff's attorney insufficient, unless the receipt has been acknowledged. (*a*) If notice cannot be personally served at attorney's office, it is sufficient if a copy has been stuck up in the K. B. office, and a copy put through door of attorneys' chambers.

WILDE moved to justify bail on an affidavit of the service of notice by leaving it at the chambers of the plaintiff's attorneys, but there was no acknowledgment that the notice had been received.

BAYLEY J. said that the rule was inflexible which required the affidavit to state that there was an acknowledgment of the notice of the bail, but allowed two days further time to give fresh notice.

(*a*) Acc. *Anon. Trin.* T. 1813, *June* 23. Justification of bail by affidavit. The affidavit of service of the notice of justification stated that notice had been put through a hole in the door at the chambers of the plaintiff's attorney, but the affidavit did not go on to state that the notice was received. *Bayley* J. said that on this account the affidavit was not sufficient; but time was given to amend.

Anon. Mich. T. 1813, *Nov.* 20th. *Hullock* moved to justify bail on an affidavit that the notice of justification had been stuck up in the King's Bench Office, and that repeated attempts had been made without effect to serve the notice at the attorney's office, and it was at last put under the door. *Dampier* J. said it was sufficient, for as much had been done as could be done; and the bail justified. See also on this point, *Jameson's* Bail, *ante* 100.

Tuesday, May 11th.

LEDBURY *against* SMITH.

Where a commission of bankrupt has been issued against a defendant, and his assignees claim the property, and the plaintiff refuses to indemnify the sheriff, the Court will enlarge the time for sheriff's returning the *fieri facias* until the next Term. But there must be a rule to shew cause. (*a*)

TAUNTON moved that the sheriff should have time to return the writ of *fi. fa.* in this cause, on an affidavit stating that a commission had been issued against the defendant, and that the assignees had claimed the property on the ground that an act of bankruptcy had been committed before the levy under the *fi. fa.* and that the plaintiff had refused to indemnify the sheriff; it was prayed that the rule should be absolute in the first instance, and for a general suspension of the return. But,

(*a*) See *Tidd*, 6th ed. 1054.

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LEDBURY *against* SMITH.

The COURT said it must be a rule to shew cause, and the return could only be stayed until the first day of next Term, when the sheriff must apply again if necessary.

Rule *Nisi* accordingly.

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DEW, ESQ. *against* PARSONS, GENT.

At common law a sheriff has no right to take fees for execution of process. By stat. 23 *H.* 6. *c.* 9. a sheriff is only entitled to fee of 4*d.* for issuing his warrant to arrest on *mesne* process, although it may have been the practice to allow more in taxing costs between the parties to a suit. (*a*) Action for money had and received lies to recover fees illegally demanded and paid to the sheriff, although indictment for extortion may be also sustainable, and consequently such illegal payments may be set off as money had and received against an action brought by the sheriff.

ASSUMPSIT by the high sheriff of the county of *Hereford*, to recover certain fees claimed to be due to him from the defendant, in respect of issuing a warrant on civil process to arrest a person whom the defendant was instructed by his client to sue. The defendant pleaded first, *Non assumpsit*; and secondly a set-off in respect of former payments of fees to the plaintiff, alleged to have been illegally demanded. At the

(*a*) By statute 32 *Geo.* 2. *c.* 28. (Lords' Act) it is provided, that no sheriff, under-sheriff, bailiff, serjeant at mace, or other officer or minister whatsoever, shall demand, take, or receive, or cause to be demanded, taken, or received, directly or indirectly, any other or greater sum or sums of money than is or shall be *by law allowed* to be taken or demanded for any *arrest or taking*, or for detaining or waiting, till the person or persons so arrested or in custody shall have given an appearance or bail, as the case shall require. But in the case of *Martin* v. *Slade*, 2 New Rep. 59. which was an action for penalties on this Act, where it was proved that the defendant, a sheriff's officer, demanded and received for the arrest the sum of one guinea, besides one guinea for the bail bond, and that one guinea more was paid by the plaintiff for supper; the Court held that the regulations of the statute of *Hen.* 6. could not now be considered as giving the rule for the amount of the fee to be taken, and that it was incumbent on the plaintiff to give some evidence that more had been taken than was by law allowed. See also 1 *Stark.* 417. *Martin* v. *Bell*, where it was proved that the fee allowed to the *bailiff* upon arrest, was half a guinea in *London* and one guinea in *Middlesex* for the caption, and that nothing beyond the amount of the stamp was allowed upon the bail bond. See also *Boldero* v. *Mosse*, 3 *T. R.* 417. As to the action for money had and received, in *Lovell* v. *Simpson*, 3 *Esp.* Rep. 153. it was held that the plaintiff might recover in *assumpsit* for money had and received, the money having been extorted from the plaintiff by the defendant taking an advantage of his situation, and under a claim of right, which the plaintiff was unable to resist.

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trial at the last Summer Assizes for *Herefordshire*, before *Holroyd* J. it appeared that the defendant, an attorney residing out of the county of *Hereford*, having applied to the plaintiff's under-sheriff, to issue his warrant to arrest a defendant whom the defendant was instructed to sue, within the county of *Hereford*, a fee of three shillings and sixpence was demanded, the demand being compounded of the sums of two shillings and sixpence, as for a warrant issued to a person residing within the county, and one shilling additional to a person residing out of the county, under which description the defendant fell. It appeared that on a former occasion the defendant had paid the plaintiff other fees, for the same species of business, amounting to one penny short of the present demand, and which payment was set-off to the present action. There were three questions made at the trial: first, whether the plaintiff's demand could be sustained at common law; secondly, whether sustainable under the statute 23 *Hen* 6, *c.* 9; and thirdly, if so, whether the defendant could set off former payments of the like kind to the present action. The learned Judge ruled against the plaintiff upon all these points, and directed a nonsuit, but with liberty to the plaintiff to move the Court. In *Michaelmas* Term *W. E. Taunton* moved accordingly, and obtained a rule *nisi* for setting aside the nonsuit and granting a new trial.

G. Cross now shewed cause against the rule, and contended, *first*, that at common law a sheriff was bound to discharge the duties of his office gratuitously, and was not entitled to demand or take any fee in respect thereof; and cited the statute of *Westminster*, (*a*) whereby it is enacted, " that no sheriff, nor other the king's officer, take any reward to do his office, but shall be paid of that which they take of the king; and he that

(*a*) 3 *Edw.* 1. c. 26.

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so doth shall yield twice as much, and shall be punished at the king's pleasure. (*a*) *Secondly*, that the only authority to justify the plaintiff in taking fees at all, must be the authority of an act of parliament. No usage which had obtained of allowing fees to sheriffs could in any degree render the demand lawful unless sanctioned by the legislature. The only act of parliament which could be cited in support of the plaintiff's demand was the 23 *H.* 6. *c.* 9; and unless the words of that act authorized the claim, it was quite clear that he could not be entitled to maintain this action. This act was passed for the purpose of repressing the extortion and oppression of sheriffs and their officers, and it prescribed a certain scale of fees, which should be taken in several cases; and it provided that no sheriff, under-sheriff, bailiff of franchise, nor any other bailiff, should, under colour of their offices, take more for the making of any obligation, *warrant*, or precept, than the sum of fourpence. The question was, whether the warrant in this case was the species of warrant referred to in the act. If it was, it was quite clear that the plaintiff could be entitled to no more than the sum of four-pence. The only foundation for this action was this statute: for, if the plaintiff went out of it, he was entitled to nothing, there being no other act of parliament which could justify the taking of so large a fee as two shillings and sixpence. But supposing him to be authorized in making such a demand for making out a warrant within his own county, nothing could justify him in demanding the additional shilling of a person who resided out of his county. By common law he was entitled to nothing as a reward for discharging of the duties of his office, and if he founded his claim upon the statute law, the utmost he could demand would be fourpence. The plaintiff here rested his claim upon strict right, and by that rule the question must be governed. The question

(*a*) See the cases collected in *Bac.* Ab. Fees A. and *Com.* Dig. Viscount, F. 1.

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here was not whether the demand was fair and reasonable, but whether it was lawful. No usage which might have arisen since the passing of this act could avail the plaintiff on this occason, because the usage of allowing higher fees was not uniform and regular, being different in different counties. This was not like a question of costs between party and party, in which the Master would be called upon to exercise his discretion in allowing fees which had been paid to the sheriff; but it was an action brought by the sheriff himself, resting upon his legal rights, by which he must stand or fall. Assuming then, that this question must be governed by the statute 23 *H.* 6. *c.* 9, the question was, *Thirdly*, whether the defendant was entitled to set off against this demand sums which had been paid the plaintiff on former occasions for the same sort of business over and above what he was legally authorized to take. It was quite clear that if the plaintiff had taken money in the shape of fees, which the law would not authorize him to receive, the defendant would have a right of action to recover it back again, as money had and received to his use. If then an action would lie under such circumstances, the right of set-off would avail the defendant in an action brought by the sheriff. Supposing the previous ground to be made out, that the sheriff had no right to demand so large a sum as had been taken, the consequence must necessarily follow that former illegal payments might be set off in an action brought by the sheriff to sustain the same species of claim. The set-off pleaded in this case covered the plaintiff's demand, and therefore the decision below could not be disturbed.

W. E. Taunton contrà, contended, 1st, That this action was maintainable for a higher fee than that prescribed by 23 *H.* 6. being in the nature of a demand for work and labour; 2dly, Supposing that statute to

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be definite as to the scale of fees to be taken by a sheriff, still the practice and usage of paying higher fees had obtained for more than 100 years, and had been recognized and sanctioned by numerous decisions of Courts of Justice.(a) Assuming these authorities to be binding on the Court, he insisted 3dly, that the defendant could not by law plead a set-off; first, because the former payments on which he rested were voluntary; and secondly, supposing those payments to have been extortionate, the proper remedy should have been an indictment for extortion, and not a plea of set-off to the present action. In support of the *first* point, he contended, that it was but reasonable, considering the great trouble and labour to which the Sheriff was put in the discharge of the duties of his office, he should be allowed reasonable fees, in order to enable him to requite the services of those, whom he was obliged from necessity to employ under him, inasmuch as it was physically impossible to discharge all the duties of his office personally.(b) For the second point he relied upon *Savage* q. t. v. *Smith*,(c) *Martin* v. *Slade*, (d) *Woodgate* v. *Knatchbull*,(e) *Boldero* v. *Mosse*, (f) where the Master allowed one guinea for an arrest and upon a levy as the usual fee, contending that these were decisive authorities to shew, that the Courts of *Westminster Hall* had sanctioned the practice of allowing such reasonable fees to sheriffs, as for the nature of their services appeared just and proper. Upon the *third* point he

(a) In the case of *Bewdley*, a practice of seven years only was allowed to prevail against the express words of an act of parliament. See 2 *Strange* 755. 3 *Burr.* 1755. But this singular doctrine is clearly not tenable. See 2 *Bla.* Com. 76, 7. *Tidd's* Practice, 6th ed. Introd. 38.

(b) But see 2 *M.* & *S.* 294. 297. where Lord *Ellenborough* C. J. said, "There are many onerous duties laid on the sheriff for which the law has not provided distinctly any remuneration, and this is one reason for appointing men of substance to the office, that they may be able to bear those duties."

(c) Sir *W. Bla.* 1101.

(d) 2 New Rep. 59.

(e) 1 *T. R.* 257.

(f) 3 *T. R.* 417.

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cited *Brisbane* v. *Dacres*, (*a*) and *Dalton's* Just. c. 39. urging that the plea of set-off was bad, as well upon these authorities as on the general principle, that the personal wrong merged in a criminal offence such as that of extortion, so as thereby to deprive the party of his civil remedy.

ABBOTT C. J. This case comes before the Court, not as a collateral question, in a suit, between party and party, as to the amount of the costs in a cause,—it involves nothing as to the ordinary practice of the Court upon the subject of costs between party and party, where the Court may exercise a discretion whether certain reasonable sums shall be paid for the expences incurred in the prosecution of a suit, and in the payment of fees to the sheriff: but it is an action brought by the sheriff himself, to recover a fee, to which he must by law shew himself entitled; and therefore if he has failed in shewing his legal title to the fee claimed, he cannot recover in this action. I am quite satisfied that neither myself nor my Brothers think ourselves at liberty to say that an act of parliament may be repealed by any practice that has arisen between parties to suits as to the taxation of costs. The next question made in this case is, as to the right of set-off. I am clearly of opinion, that if the defendant had upon former occasions paid to the sheriff larger sums than the sheriff was by law entitled to receive, he had a right in this action to set off those payments against the fees now demanded. Then the question is, (allowing the set-off to some extent) whether the plaintiff has made out a title to recover any thing in this action. That must depend upon the amount of fee which he is entitled to charge. The argument used by the defendant is, that by the common law of the land the sheriff can make no charge of this kind, because it is made in respect of a part of his duty,

(*a*) 5 *Taunt.* 143.

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which the law requires him to perform gratuitously, and that if he is entitled to charge any thing at all, he must shew his title under some act of parliament. That brings us to the construction of the 23 *H.* 6. *c.* 9, namely, whether the word "warrant" there mentioned, in respect of which the sum of fourpence is to be paid, means *the warrant* for which the charge, which constitutes the subject of the present action, is made. It seems to me that it does; but if it does not, the case made out on the part of the plaintiff furnishes no ground for claiming the present demand; and it appears to me that the sheriff cannot be allowed in a court of law to insist upon his right to take this sum of two shillings and sixpenee. I am sorry the action is brought, and I almost wish it had not, because the small sum of two shillings and sixpence, which has been charged, seems to be reasonable and proper; but we cannot alter the law, or to give the sheriff what we think reasonable and proper, if the law has not given it him. Probably the dispute would not have arisen if the subsequent charge of one shilling made by the sheriff to a person out of his county had not been insisted upon, and for which there was no pretence.

HOLROYD, J. (a) I am of the same opinion, that the nonsuit in this case must stand. We are to decide upon the rights of the parties as they are by law defined; and if the defendant has by his clerk paid more money to the sheriff or to the officer than the sheriff was entitled to demand, he cannot, upon any grounds either of law or equity, retain it; and if the defendant insists upon the return of such payment, the sheriff is in law liable to make the return. It seems to me clear, that the defendant has a right of set-off in this case, assuming the plaintiff to have taken more money than

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(a) *Bayley*, J. had left the Court to attend chambers.

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by law he was entitled to have received. It is clearly established by the statute of *Westminster*, which has been cited, that the sheriff, in the execution of his office, is entitled to receive no fee, unless it be allowed by act of parliament. No act of parliament has been cited, nor is any supposed to exist, by which the plaintiff can claim any sum for the taking of a warrant, unless it is the statute of 23 *H.* 6. *c.* 9. The warrant in this case appears to me to be a warrant within the meaning of that statute. Though the first part of the statute limits the taking of fees by the bailiffs of franchises, and so on, yet the part of the statute applicable to this case is, that the sheriff shall take no more for granting his warrant, upon application made to him for that purpose, than the sum of fourpence. That prohibition is directory in the first part of the statute, and I conceive that to be the effect of the prohibition in the latter part of the same act. That being so, unless there is some other act of parliament which gives him a right to something more, no usage that has prevailed since can operate against the parties who resist the payment, or extend the act of the legislature. But it is said, that in some cases which have come before the Court, the Court have allowed larger sums to be taken. Without deciding whether the sheriff's bailiff comes within this statute or not, none of the cases go to shew that the sheriff's bailiff can establish, by any action to be brought by himself, he has a right to the sum of one guinea; nor is it necessary in this case to decide whether he is or is not within the statute of 23 *H.* 6. But the cases which have come before the Courts have decided nothing more than this:—that where the plaintiff has paid the sum of a guinea to the bailiff, he has been allowed it by the master or prothonotary in the taxation of costs. They do not go so far as to establish a right in the bailiff, at law, to demand that sum, nor do they go to decide whether he is or is not within the statute of *H.* 6. and

therefore these cases appear to me not to affect the present question.

BEST J. Whether it was wise for the plaintiff to bring this action it is not for the Court to determine; but I think it may be productive in the result of considerable improvement in the mode of paying the fees of sheriffs; for if the fees of the sheriffs are insufficient, it is a subject upon which the legislature may interfere. It may be considered by the Legislature, whether the fees now allowed by law are a sufficient remuneration for the trouble that is cast upon the sheriff. For the purpose of the present case, however, it is sufficient for this Court to say, that the fee which is now demanded cannot be allowed by the law as it now stands; and if any authority were wanting upon the subject, the case of *Woodgate* v. *Knatchbull* (a) decides most distinctly that a sheriff cannot claim, as matter of right, more than the Legislature prescribes. If this were an action brought, not by the sheriff himself, for fees claimed, but by a person who had paid them to the sheriff, such person might stand, perhaps, in a different situation from the sheriff himself; but in the present case I take the law to be clear against the sheriff, and probably the decision of this case against the plaintiff may lead to something being done, which may give the sheriff proper fees as a remuneration for his trouble; but this can only be effected in one way, viz. by the interposition of the Legislature. There appears to me to be no ground made out for setting aside this nonsuit and granting a new trial. It is contended, that the sheriff is entitled to this fee of two shillings and sixpence on each warrant. I can find no act of parliament, or any thing in the common law, which authorizes me to say that the sheriff is so entitled. No act of parliament says so—no decision of the Courts says so; and it ap-

(a) 2 *T. R.* 148.

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pears to me to be perfectly clear, that the sheriffs are not authorized to take any fee but what is declared by act of parliament to be lawful. In saying this, I have the authority not only of *Woodgate* and *Knatchbull*, but also the other cases cited in the course of the argument. But supposing it could be said that, independently of an act of parliament, the usage which had obtained in practice sanctioned such a charge, the cases cited present nothing like a usage to support this claim, for the usage to be established here is, to pay 2*s.* 6*d.* if a man happen to live in the county, and 3*s.* 6*d.* if he live out of the county. This is a usage so absurd, that it never could be sanctioned by any court of justice whatever. If any such usage could be proved, it would be in direct contravention of the express words of acts of parliament, and nothing could be more inconsistent and unreasonable. It appears to me, therefore, that there is no pretence for saying that the plaintiff is entitled to these fees. If he is entitled to any thing, it is to fourpence, under the statute of *H.* 6. and to nothing else. If he gets out of that statute, he must discharge the duty cast upon him on the terms which the law imposes. Then the next question is, whether the defendant is entitled to this set-off. I am clearly of opinion that he is entitled to it. He is entitled to set off any thing for which he could maintain an action, for it is clear he could recover back this as money paid, and which the plaintiff had received to his use. It appears to me to be perfectly clear, that this would be money received by the plaintiff to the use of the defendant. This case has been likened to a case of which I have a distinct recollection, for I remember perfectly well arguing the case on the part of the plaintiff, namely, *Brisbane* v. *Dacres*. (*a*) No two cases can be more dissimilar. In that case both the gallant officers belonged

(*a*) 5 *Taunt.* 143.

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to the same service; each knew equally well the rules of the service, and what were the rights of each according to those rules. Is that the situation of the present parties? the present parties do not stand under the same circumstances. The plaintiff is the sheriff, and the thing claimed was the fee of the sheriff: the sheriff is bound to know his own fee, but I don't know that the person of whom the fee is claimed is bound to know it. The sheriff, knowing what his own fee is, is bound to take care that he does not take more than he is legally entitled to demand. If, however, he does take more, it may be recovered back again by the person from whom the excessive fee has been extorted. But it has been said that this demand, being in the nature of an extortion, the sheriff is liable to an indictment, and that that should have been the course pursued, instead of softening the case down by this sort of action. I know of only one case in which the private injury merges in that of the public injury, and that is the case of felony. Where the conduct of a party amounts to felony, the civil action merges in that high offence. But in all offences of a minor description, as, for instance, in the case of usury, there may be an indictment for the usury, and a civil action for the money paid. So in the case of extortion there may be an indictment for the extortion, and a civil action to give the party a contribution for the injury he has sustained, or to recover back the money which has been extorted from him. On these grounds it appears to me that there is not the least pretence for this action.

Rule discharged.

STEVENS'S *Bail.*

Wednesday, May 12th.

It is no objection to bail, that he is liable as indorser of the bill of exchange, on

D. *F. JONES* opposed the justification of the bail by affidavit in this case, on an affidavit which stated, that one of the bail was liable as indorser of the same

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bill of exchange upon which the plaintiff was sued, and that the bail were also bail in other actions still depending. He submitted therefore, first, that the plaintiff would not obtain any additional security by the proposed bail, and consequently they ought not to justify. And secondly, that the affidavit of justification

which the action is brought. In bail by affidavit in this Court, it need not be stated in the affidavit of justification that the bail are worth double the amount of the sum for which he justifies, over and above his liability in other causes. (a)

(a) As to the *first* point, see *Mitchell's* Bail, *ante* 287; *Harris* v. *Manley*, 2 *Bos.* & *Pul.* 526.

As to the *second* point, it seems that by the practice of *this Court*, where the same persons are bail in more actions than one, and justify by affidavit, it is sufficient for them in each action to swear that they are worth double the amount of the sum sworn to in that action. *Attwood* v. *Emery*, *Mich.* T. 1817, per ABBOTT J. after reference to the Master.—Anon. *East.* T. 1815, *April* 29th, *V. Lawes* opposed the justification of bail by affidavit, suggesting that they had before been bail in other actions, and should therefore have stated in their affidavit that they were worth double the amount of the sum sworn to in the other actions; and *Lawes* said, that BAYLEY J. had in a late case under the same circumstances required the bail to make such an affidavit; but DAMPIER J. said it was not necessary; and see *Tidd*, 6th ed. 267.

In the *Common Pleas*, in *Field* v. *Wainewright*, 3 *Bos.* & *Pul.* 39. it was held, that in justifying bail by affidavit, where the same persons are bail in more actions than one, each affidavit ought to state that the bail are worth double the amount of the debts in all the actions wherein they offer to become bail; but see *Reid* v. *Cornfoot*, 7 *Taunt.* 324. where the plaintiff had commenced two actions on a bill for 250*l.* one against the drawer, the other against the acceptor, and the same persons became bail for both defendants, justifying by affidavit, and in the affidavit in each action swore that they were worth 500*l.* after payment of all their just debts; and the Court allowed them to justify, BURROUGH J. observing, that if a man justifies bail by affidavit on two successive days in two several actions, it never yet was seen that the latter affidavit particularized his liability on the former action more than any other of the debts of the bail. Vide 1 *Moore* 29, where the report of this case is different. In the *Exchequer*, it seems that the affidavit of justification in each action ought to state that the bail are worth double the amount of the sums sworn to in both actions. *Anon. Excheq. Saturday*, *May* 22, 1813, *Wightwick* moved that bail might justify by affidavit; when *Lowe* objected to the justication, on the ground that the same persons appear to have become bail in another action, and the affidavit in the present case did not state that the bail were worth double the aggregate amount of the sums sworn to in both actions: and it was said to be the rule of this Court, that the affidavit should contain such a statement. *Field* v. *Wainewright*, 3 *Bos.* & *Pul.* 39. was mentioned in support of the objection, and *per Curiam.* The affidavit is defective in this respect, but time shall be allowed for the purpose of making the amendment. The officer of the Court, on being referred to, certified the practice in conformity with this decision. See also *Jones* v. *Ripley*, 3 *Price* 261, S. P. *Tidd.* 6th ed. 267.

should have sworn, that the deponent was worth double the sum for which he now proposed to justify over and above what he was liable for in all the other actions.

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STEVENS'S BAIL.

HOLROYD J. said as to the first objection, that in this Court a person who is liable on the same bill upon which the action is depending, is, according to the practice, competent to become bail, though, in effect, the plaintiff may not acquire any additional security. As to the second point, though the practice of the Court of Common Pleas might require an affidavit by the bail that they are worth double the amount of the debts in all the actions wherein they offer to become bail, that is not the practice of this Court. And if the plaintiff insists on their insufficiency, he must oppose them by an affidavit on his behalf, shewing that they have become bail in certain enumerated actions for specified sums, and that they are not worth double the sums sworn to in all the actions; upon which the bail will be rejected, unless such affidavit shall be satisfactorily answered.

Bail allowed.

WATERHOUSE'S *Bail.*

Thursday, May 13th.

Bail, after having passed, may be rejected before the rule for the allowance is drawn up, if sufficient cause be shewn, as if the same bail are afterwards rejected in another action. (*a*)

THE same bail came up to justify in three causes against the same defendant. In one they justified, after having been opposed by counsel, and in the second they were rejected on the ground that one of them, who described himself as a wholesale jeweller, was unable to enumerate any more than two of his customers, and was evidently insufficient.

(*a*) So Anon. *East.* T. 1813. *Friday, May* 14th. Bail had justified in several actions without opposition, but was afterwards opposed and rejected. BAYLEY J. said, that the former justification without opposition must be set aside, and that it was the usual practice in the Common Pleas, and ought always to be so.

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Park, who opposed them in the first cause, then moved that they should be rejected in that, as well as in the other causes; contending that though they had been suffered to pass, yet it was in the discretion of the Court, whether the rule for the allowance should be drawn up; and that, in fact, they would not be considered as bail until the rule was drawn up.

HOLROYD J. entertained some doubt as to the practice, but after conferring with Mr. *Platt* and Mr. *Chapman*, said, that there were flagrant cases in which the Court would interpose such a discretion. The bail could not be considered as having passed until the rule for allowance was drawn up, because till then it was a matter *in fieri*. It was but reasonable that this should be the practice, and it was competent in certain cases for the plaintiff to move for an attachment before the rule for the allowance was drawn up. In the present case, the bail had been rejected in one cause, and the same objection ought to prevail against them in the others.

Rejected in all the causes.

D. F. Jones for the plaintiff in the second action, and *Arabin* for defendant.

Thursday, May 13th.

MORGAN'S *Bail*.

Two days notice of justification must be given in the case of added bail, and therefore where notice was given on *Monday* for *Tuesday* (by mistake for *Wednesday*), and on *Wednesday* another notice was given for *Thursday*, the bail were rejected. (*a*)

NOTICE of justification had been given in this case on *Monday* for *Tuesday*, the defendant meaning to

(*a*) In C. P. two days notice of justification must be given, as well where the bail originally put in, intend to justify as in the case of added bail. *Nation* v. *Barrett*, 2 *Bos.* & *Pul.* 30. In K. B. one day's notice, that is, notice on one day to justify on the next, is sufficient where the bail already put in intend to justify. *Wright* v. *Ley*, 2 *Bos.* & *Pul.* 31. (*a*) *Tidd.* 265. But when other bail are added to those already put in, there must be two days previous notice of justification, one inclusive, the other exclusive, as *Monday* for *Wednesday*. *Tidd.* 6th ed. 265.

give notice for *Wednesday*, counsel were instructed on *Tuesday* to oppose the bail, but they did not appear. On *Wednesday* they did appear, but were not allowed to justify, as the notice was in terms for *Tuesday*, and not for *Wednesday*. Fresh notice was then given for to-day, and

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Hutchinson now opposed their justification, on the ground that there had not been two clear days' notice, for though the first notice given might be good in substance, it was bad in form; and therefore when a fresh notice was given on *Wednesday*, it was to be considered in the same light as if no prior notice had been given.

HOLROYD J. said the objection was unanswerable, and therefore the bail were

Rejected.

LEWIS *against* THOMPSON.

Thursday, May 13th.

ONE of the bail in this case, on coming up to justify, admitted that he owed the King's taxes for a year, although they ought to be paid half yearly; and stated that the reason why he did not pay them half-yearly was, that the collector was in the habit, as a matter of arrangement, to let them run for a year. The collector had applied to him lately, and he had promised

Bail rejected for not paying arrears of king's taxes, although in a condition to pay them at the time of coming up to justify. (a)

(a) Several other bail were rejected for the same cause during the Term. But in *Spurdens* v. *Mahoney*, *Monday*, *May* 24, where the bail admitted that he had not paid his taxes for a twelvemonth, and that the tax-gatherer had called three times upon him to know if he was ready, and that he had promised to pay in a few days, but stated, that he had been in the habit of thus paying his taxes for three years, with the concurrence of the collector, and that he had property sufficient, BAYLEY J. did not reject the bail, but gave time to inquire further into his circumstances, upon the terms that the bail should, when he again appeared to justify, produce a receipt for all taxes due at the time.

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to pay them next week, and was in a condition so to do when called upon.

Chitty in support of the bail submitted that though these circumstances might afford ground of suspicion that the bail was not in affluent circumstances, that inference might be rebutted; and that therefore the bail should be admitted to state of what property he was possessed. But

HOLROYD J. would not suffer him to justify.

Bail rejected.

Thursday, May 13th.

DOE dem. GILES *against* WYNNE, BART.

Where the plaintiff tried his cause and was nonsuited, and a new trial was granted, the defendant cannot move for judgment as in case of nonsuit, though he may for costs for not proceeding to trial according to notice. (*a*)

CROSS moved for a rule *Nisi* for judgment, as in case of a nonsuit, on an affidavit stating that the cause had been tried at the Summer Assizes, 1817, when the plaintiff was nonsuited; that in *Trinity* Term, 1818, a new trial had been granted, and the plaintiff did not proceed to trial at the ensuing Summer Assizes,—that the defendant applied to plaintiff's attorney just before the last Spring Assizes, to know if he would try the cause at the ensuing Assizes, stating, that if he would not, the defendant would try by proviso, upon which the plaintiff's attorney declared that he should try, and afterwards gave notice of trial, but did not try.

BAYLEY J. You are in a situation to move for costs for not proceeding to trial pursuant to notice, but as the plaintiff has once taken down the record to trial, a motion for judgment as in case of a nonsuit cannot be sustained.

(*a*) It is a general rule, that where the cause has been once carried down to trial, the defendant cannot have judgment in case of a nonsuit for not carrying it down again, but must try by proviso. *Tidd*, 6 ed. 821. And see *post* 317.

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Friday, May 14th.

SANSOM and OTHERS *against* GOODE.

A warrant of attorney will not be set aside on the ground that the defeazance only states the amount of the sum secured by the judgment, without noticing collateral securities. Same practice in C. P. (*a*)

PULLER had on a former day moved for a rule *Nisi*, to set aside the warrant of attorney which had been given in this case, and the judgment entered up, and execution issued and executed thereon, upon the ground of non-compliance with the rule of Court of *Mich.* T. 42 *Geo.* 3. which requires that every attorney who prepares any warrant of attorney subject to a defeazance, shall cause the defeazance to be written upon the same paper or parchment upon which the warrant of attorney shall be written, or shall cause a memorandum in writing to be made on such warrant, containing the substance and effect of such defeazance. (*a*) In the present case, the indorsement of the warrant of attorney was not a sufficient compliance with this rule, for it merely stated that the warrant of attorney was given to secure the payment of the sum of 3093*l.* 19*s.* 2*d.* together with the costs and all other incidental expenses, whereas the transaction, as it appeared on the affidavits, was this: In *January* 1818, the defendant had given his promissory note to the plaintiff to the amount of 3093*l.* 19*s.* 2*d.* in payment of goods he had purchased. The note was dishonoured. A meeting afterwards took place between the parties at a banking-house at *Litchfield*, for the purpose of arranging the

(*a*) By rule K. B. *Mich.* 42 *Geo.* 3. it is ordered, that every attorney of this Court, who shall prepare any warrant of attorney to confess any judgment which is to be subject to any defeazance, do cause such defeazance to be written on the same paper or parchment on which the warrant of attorney shall be written, or cause a memorandum in writing to be made on such warrant, containing the substance and effect of such defeazance. The rule in C. P. is in the same terms, *Mich.* 43 *Geo.* 3. C. P. From the words of the rule therefore, it seems to have been the intention of the Court to impose a duty on the attorney, but not to render the security void, if the defeazance should be omitted: and accordingly that construction has been put upon the rule in both Courts. *Shaw* v. *Evans*, 14 *East*, 576. *Partridge* v. *Fraser*, 7 *Taunt.* 307, 8. But see *Barber* v. *Barber*, 3 *Taunt.* 465.

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manner in which the plaintiff's debt should be paid. On that occasion the defendant, to prove his solvency, exhibited invoices of certain consignments of goods coming to him from *Naples* and other places. Before any arrangement took place the defendant was arrested at the banking-house, and the plaintiffs insisted upon his executing a warrant of attorney, with power to them to reserve to themselves the consignments in question, when they should arrive. The warrant of attorney was accordingly executed, but the indorsement upon the back of it omitted to mention the collateral security of the promissory note, merely stating that it was given to secure the payment of the sum mentioned, with lawful interest of the same, together with the costs of entering up judgment, &c. *Best* J. who sat alone when the motion was made, granted the rule *Nisi*, on the authority of *Morell* v. *Dubost*, (a) where it was held not to be sufficient that the defeazance of a warrant of attorney merely shewed the amount of the sum secured by the judgment, but it must also notice all collateral securities by which it is secured. *Marryat* was now proceeding to shew cause, and, on mentioning the objection, he was stopped by the Court, who observed that a different decision had taken place in this Court from that in C. P. and therefore called upon

Puller to support his rule. He again urged the authority of *Morell* v. *Dubost* and *anor.* as decisive of the question. In that case the defendant *Dubost* being indebted to the plaintiff in 240*l.* a written agreement was entered into, that he and the other defendant should give their acceptances for 240*l.* and should also deposit in the plaintiff's hands a valuable picture, with power for the defendant to sell it, in case the acceptance should not be duly paid, and to retain the pro-

(a) 3 *Taunt.* 235. But see *Rartridge* v. *Fraser*, 7 *Taunt.* 307.

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ceeds in part payment of the debt, but the defeazance mentioned nothing of this latter security; and *Mansfield* C. J. said, "No doubt the defeazance ought also to have stated the other part of the agreement, that if the money was not paid at the day stipulated, the picture should be sold, and the proceeds applied in part payment of the debt, and that the judgment should afterwards stand in force for the residue only. The meaning of the rule is the same as the intent of a part of the Annuity Act, that it may appear upon what terms the judgment shall be entered up and execution taken out; it is a clear and gross irregularity." The good sense of the rule laid down by the Chief Justice of C. P. was obvious, and the defeazance upon the warrant of attorney in this case was quite illusory, in not having stated the real nature of the transaction, so as to enable the defendant to *recoup* himself in the event of the debt being paid out of the proceeds of the consignments he expected to receive. All the securities ought to have been mentioned, and the defeazance not having done so, it was clearly irregular, and the warrant of attorney must be set aside.

The COURT having spoken with the Master, were referred to the case of *Shaw* v. *Evans*,(a) where it was held, that if the attorney employed to prepare a warrant of attorney to confess judgment, which is to be made subject to a defeazance, neglect to insert such defeazance on the warrant, which is required by the rule of Court of *M.* 42 *G.* 3. the security is not thereby avoided against the innocent party, but the attorney is guilty of a breach of duty imposed on him by the Court, and answerable for it on motion.

ABBOTT C. J. It has been decided in this Court,

(a) 14 *East.* 576. And see *Partridge* v. *Fraser*, 7 *Taunt.* 307.

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that an entire omission to comply with the rule of *M.* 42 *G.* 3. does not avoid a warrant of attorney as against the parties to the security. It seems, therefore, to be a necessary consequence, that the defect of a defeazance in omitting to state some part of the consideration for which the warrant is given, cannot avoid the security. I am extremely sorry to see any difference of opinion between the two Courts. I confess, however, that the decision of this Court is the most reasonable, (*a*) because we ought not to extend the rules of the Court so as to destroy securities of this kind, in cases that do not come plainly and unequivocally within the letter and the spirit of the rule.

BAYLEY J. and HOLROYD J. were of the same opinion.

BEST J. Had I been aware of the decision in this Court, I certainly should not have granted the rule *nisi*. The rule of *Mic.* 42 *G.* 3. is only directory as to the duty of the attorney, but it does not vacate the instrument; and as I think that the construction put upon it by this Court is the right one, this application ought to be refused.

Rule discharged, with Costs.

(*a*) And see *Partridge* v. *Fraser*, 7 *Taunt.* 306 in C. P.

Friday, May 14th.

——, *against* HOBSON *and* OTHERS.

Affidavit to enter up judgment upon an old warrant of attorney must positively state that the defendant was seen and alive within the Term. Information and belief, even though the party keeps out of the way to avoid execution, is not sufficient. (*a*) Judgment cannot be entered up on a joint warrant of attorney against any of the makers of it, unless they are all proved to be alive within the Term. (*a*)

READER moved to enter up judgment upon an old warrant of attorney made jointly by three persons, on an affidavit stating that two of them were alive, and

(*a*) If the warrant of attorney be above ten years old, application for leave to enter up judgment must be made to the Court, and where it is above twenty

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had been seen by the deponent within the Term, and that as to the third, he had called at the house where he had used to lodge, and inquired after him of a servant, who stated that he was alive on the 12th instant, but refused to inform the deponent where he resided. The deponent stated, that he verily believed the said third party kept out of the way on purpose to avoid being seen. Under these circumstances the question was, whether the Court would grant the rule for judgment against all the defendants.

The COURT said, that the rule of Court in these cases was inflexible. The affidavit upon which judgment is moved must positively state that the party was alive and was seen within the Term. As to one of the defendants in this case, the deponent merely spoke as to his information and belief, which was not sufficient.

Reader then applied for judgment against the two defendants who were sworn to be alive within the Term.

PER CURIAM. This is not a joint and several warrant of attorney, but merely joint, and therefore you must have judgment against the three parties or not at all. Had it been joint and several, the Court would have granted judgment against the persons who were proved to be alive within the Term.

Rule refused.

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years old, there must in general be a rule to shew cause. *Tidd*, 6 ed. 578. And the affidavit in support of the rule may properly be entitled in the cause in which judgment is entered up. *Sowerby* v. *Woodroff*, 1 *Barn.* & *Ald.* 567. A warrant of attorney given by two "to appear for *us* A. B. and C. D., to receive a declaration for *me*, and to confess the same action," &c. will not authorize the entering up judgment against one after the death of the other. *Raw* v. *Alderson*, 7 *Taunt.* 453. 1 *Moore*, 145, S. C. *Gee* v. *Lane*, 15 *East*, 592. Aliter on the death of one of two persons *to whom* the warrant is given. *Fendall* v. *May*, 2 *M.* & *S.* 76. And see *post* 322.

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Friday, May 14th.

Ex parte ———

Affidavit to readmit an attorney who had not taken out his certificate for more than a year, must state in express terms that he had not practised in the interval. (*a*)

READER moved that a gentleman who had ceased to practise as an attorney for more than a year might be readmitted without fine, and without payment of any arrears of duty. The affidavit did not in express terms state that he had not practised during the interval; and

Holroyd J. said this was not sufficient, as the affidavit must in express terms state that the party had not practised during the interval in which he had not taken out his certificate.

The affidavit being subsequently amended, the fiat was granted on the terms prayed.

(*a*) See *Ex parte Richards*, *ante* 101, where the affidavit contained such a statement. See also *Ex parte Bartlett*, *ante* 207.

Monday, May 17th.

Walker's *Bail.*

The occupier of a tap connected with a tavern, the license being taken out in the name of the tavern-keeper, cannot justify as a housekeeper. (*a*)

ONE of the bail in this case offered to justify in respect of the occupation of a tap which he rented adjoining to a tavern, and which formed a part of the latter building, but there was no communication between the one and the other. It appeared, however, that the licence for the tap was taken out in the name of the tavern-keeper; and

Bayley J. said, that the bail could only be considered as an inmate, and not as the housekeeper, and therefore he was rejected; but two days time were given to add and justify other bail.

(*a*) See *Burn* J. tit. Alehouses, sect. 2. See *Tracy* v. *Talbot*, 2 *Salk*. 531. 1 *Nolan's* Poor Laws, 151, 2, 3d ed.

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Monday, May 17th.

THEOBALD *against* CRICKMORE.

A Term's notice is not necessary in case of a trial by proviso after a lapse of four Terms; nor on motion for judgment as in case of a nonsuit. (*a*)

CHITTY on a former day obtained a rule, calling on the defendant to shew cause why his proceedings and the verdict in his favour should not be set aside for irregularity, on an affidavit stating that this was an action of trespass, tried in *Essex* at the Summer Assizes *A. D.* 1817, when a verdict was found for the plaintiff for five shillings. In the following Term the defendant obtained a rule for a new trial, which, after argument, was made absolute on 19th *January* 1818. No proceedings were taken by either party until last *Hilary* vacation, when on the 27th *February* the defendant gave notice of trial by proviso at the last *Lent* Assizes, and carried down the cause, and the plaintiff not having appeared, the defendant obtained a verdict. The irregularity complained of was, that the defendant had not given a Term's notice of trial, as required by the practice after the lapse of four Terms.

Walford now shewed cause, and submitted that the rule requiring a Term's notice, where no proceedings

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(*a*) In note *c* to rule *Mich.* 4 *Ann.* (1705) it is stated, that in causes wherein no proceedings have been had within four Terms after issue joined, then a Term's notice must be given; and so likewise by proviso, unless the cause has been stayed by injunction or privilege.—In C. P. there is a rule, *East.* Term 13 *Geo.* 2. 1740, by which, after reciting that by the ancient rule of that Court in all causes in which there have been no proceedings for four Terms, exclusive of the Term in which the last proceeding was had, the party who desires to proceed again shall give a Term's notice to the other of such proceeding, that such notice shall be given before the essoign day of the 5th, or other subsequent Term, that a Judge's summons, if no order be made thereupon, shall not be deemed a proceeding, but that a notice of trial, though afterwards countermanded, shall be deemed a proceeding within the meaning of this rule. In *May* v. *Wooding*, 3 *M.* & *S.* 500, it was held, that a rule for judgment might be entered, and judgment signed without a Term's notice, although no proceedings had been had for four Terms after *verdict*, the matter having passed in *rem judicatam*, and there being no act to be done by the other party. See *Imp.* K. B. 421; *Tidd*, 6th ed. 925, 6.

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THEOBALD *against* IC KMORE.

have been had for four Terms, did not apply to a case like the present. He could find no precedent which required a Term's notice as against a defendant. In all the cases in which the rule for giving a Term's notice had been enforced, it was as against plaintiffs; and there was much greater reason why it should be enforced as against a plaintiff than as against a defendant, because the former must be taken to know the state of his own cause, and he was not likely to be taken by surprise. In all events the rule could not be enforced until there was a voluntary delay on the part of him against whom it was sought to be enforced. It was held in *Doe* v. *Moses*, (*a*) that the rule requiring a Term's notice of proceeding does not extend to a motion for judgment as in case of a nonsuit, and the practice of applying for a judgment as in case of a nonsuit had been substituted for the trial by proviso.

Chitty, in support of the rule, referred to the rule of Court of *Mic.* T. 1561, contending, that in case of a trial by proviso the defendant must give the like notice to the plaintiff as the plaintiff would have been obliged to give to him. [ABBOTT C. J. Is there any written rule of Court as to giving a Term's notice ?] None; it rests upon the general practice of the Court. It is laid down in *Sellon*, 419. *Tidd*, 820. that if a defendant proceeds by proviso, he must give the same notice of trial as the plaintiff would have been obliged to give him. From all the authorities, it is clear that where no proceedings have been had for four Terms there must be a

(*a*) 5 T. R. 634. But in *Roe* v. *Dunning*, *Barnes*, 308. where S. P. was ruled; the reason given was, that the general rule of Court extends only to the party's intent to proceed, and not to motions to *end proceedings*. And see *Tidd*, 925, 6. In *Manby* v. *Wortley*, 2 *Blu. Rep.* 1223. the reason given is, that the rule requiring a Term's notice, which is in that Court of *East.* T. 13 *Geo.* 2. does not apply to judgments as in case of a nonsuit, because it was made previously to stat. 14 *Geo.* 2. *c.* 17. The case in 5 *T. R.* 634, professes to be determined on the authority of the case in 2 *Bla. Rep.*

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THEOBALD *against* CRICKMORE.

Term's notice of trial. The first case upon this subject is *Hatchell* v. *Griffiths*, (a) which establishes this rule, and the reason for it is, that where a party has lain by for so long a period as four Terms, it is fit and proper that the opposite party should not be taken by surprise by having an eight or a ten days notice of trial; and there appears to be no exception to the rule in favour of a defendant. The same rule was laid down in *Ashwin* v. *Corbill*, (b) and in *Lazier* v. *Dyer*. (c) In the case of *May* v. *Wooding*, (d) Lord *Ellenborough*, C. J. gave the reason for the rule, which was this:—That while the matter is still in controversy the party should, after so long a lapse as four Terms without any proceedings, have notice, that he may prepare himself.

ABBOTT C. J. As the practice of moving for judgment as in case of nonsuit is substituted for that of trial by proviso, and there being no authority cited for giving a Term's notice in case of trial by proviso, it seems to me that the practice which has prevailed in motions for judgment as in case of a nonsuit, ought to prevail in this case. In motions for judgment as in case of a nonsuit, a Term's notice is not requisite; and from the analogy between the two cases, I am of opinion that it is not necessary in a trial by proviso. The other Judges concurred.

Rule discharged without Costs.

(a) 2 *Salk*. 645. (b) *Ib*. 650. (c) *Id*. 650.
(d) 3 *M*. & *S*. 500.

ISRAEL *against* MIDDLETON.

Monday, May 17th.

Defendant having been served with copy of process by the name of *John*, observed that his name was *Nicho-*

ESPINASSE, on a former day, obtained a rule calling on the plaintiff to shew cause why the service of the writ should not be set aside for irregularity, with costs; the irregularity being that the defendant's

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ISRAEL *against* MIDDLETON.

las; and person who served the copy was about to alter the name, when defendant said, Never mind, I am the person, and will take care of it. *Held*, That a writ or copy cannot be altered without re-sealing, and that the service should be set aside, but without costs. (*a*)

name in the copy of process served on him was *John* instead of *Nicholas*.

Comyn shewed cause, and admitted that this was an irregularity, but submitted that it had been waived by the defendant himself. The affidavit of the attorney's clerk stated, that when he went to serve the copy of the process upon the defendant, the latter informed him that his name was *Nicholas* and not *John*. Upon which the clerk asked for pen and ink, and was going to alter the name from *John* to *Nicholas*, when the defendant said, " Never mind, I am the person, and I will take care of it." He submitted therefore that this was a clear waiver of the irregularity.

PER CURIAM. The defendant's waiver of the irregularity would not have made the original proceeding regular. The writ itself is not right: therefore the

(*a*) And the Court will not allow the copy of a writ to be amended so as to make the service good. *Sutherland* v. *Tubbs*, *Mich.* T. 1814. *Nov.* 28. *Lawes* E. moved for a rule to shew cause why the copy of a writ, the service of which had been set aside for irregularity, on account of the year being expressed in figures instead of words (an objection, however, which has since been held untenable, *Butler* v. *Cohen*, 4 *M.* & *S.* 335; *Eyre* v. *Walsh*, 6 *Taunt.* 333; 1 *Marsh*, 577, S. C.; *Pinero* v. *Hudson*, MSS) should not be amended so as to cure the irregularity. But *Le Blanc* J. said, " that the motion was new, and could not be supported. How can the copy of a writ be amended so as to make the service good? I have never heard of such an application." Rule refused. The Court, however, have allowed an amendment in the Term in which the tenant is directed to appear in the notice at the foot of an ejectment. *Doe* dem. *Bass* v. *Roe*, 7 *T. R.* 469. With respect to altering the writ after it has been sealed, by a notice fixed up in the Seal Office, *Inner Temple Lane*, 3d *April*, 1747, after reciting " that the fees of this office had been lately very much decreased, to the manifest prejudice of the patentee and chief justices of the respective Courts of K. B. and C. P. and the same appearing for some time past to be in a great measure owing to the sealing of blank writs, several of which, after sealing them, had been made *testatums* and *non omittas's* besides other irregularities practised thereby, it is ordered, that for the future no printed blanks or other writs whatsoever be sealed before the same are regularly made out and filled up. By order of the Comptroller." Rules and Ord. K. B. *Hil.* 20 *Geo.* 2; *Tidd*, 6 ed. 49. But writ may be amended by leave of the Court on motion, as if return day be irregular, &c. *Reubel* v. *Preston*, 5 *East.* 291; 5 *Taunt.* 853.

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ISRAEL *against* MIDDLETON.

alteration in the copy would have no effect. The alteration of the writ is not a necessary consequence of the defendant's saying all was right, so as to cure the original defect. The writ could not have been altered without being resealed, which certainly might have been done before the return; but the defendant must have been served again after it was resealed. The plaintiff's attorney was going to do an act which of itself would have been an irregularity, for if he had made the alteration, and left the copy of process with the defendant, that would have been irregular. The defendant's waiver could not cure the defect; and therefore the rule must be absolute, but without costs.

Monday, May 17th.

WILLIAMS *against* HUNT.

Affidavit in support of rule *Nisi* for reviewing taxation of costs must be confined to the objections alleged against the taxation, and not enter into the merits of the cause. (a)

THE defendant (in person) moved, that it be referred to the Master to review his taxation of costs in this action, in which he had suffered judgment to go by default, and in which a writ of enquiry had been executed. The affidavit upon which he moved was not confined to the precise matters of objection to the Master's taxation, but entered into a long detail of the merits of the cause.

The COURT said they could not receive such an affidavit in support of the motion now made, still less would they grant a rule *nisi* upon it, because it would impose upon the plaintiff the unnecessary and expensive burthen of taking a copy of an affidavit, three-fifths of which were irrelevant to the question of costs. The defendant must expunge all impertinent matter, and confine his affidavit to the subject of his motion.

The defendant having afterwards remoulded the affidavit, obtained a rule *nisi*, which was afterwards discharged.

(a) As to the mode of framing affidavits in general, see *Tidd*, 6th ed. 519.

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Monday, May 17th.

HARRIS *against* WADE and STONE.

Judgment cannot be entered up against two defendants on a warrant of attorney purporting to be an authority to confess a judgment against three persons, one of whom afterwards refused to execute; and the judgment against the two was set aside, on motion, but without costs, and on terms of no action being brought. (*a*)

READER on a former day obtained a rule *nisi* for setting aside the judgment signed, and all subsequent proceedings in this cause, for irregularity, with costs to be taxed by the Master, and for restoring to the defendants the money levied under the execution, on the ground that the warrant of attorney only authorized a joint judgment against three persons, whereas the plaintiff had signed the judgment and issued execution against two persons.

Espinasse now shewed cause upon an affidavit, which stated that the original action was brought against the three defendants, and that it was subsequently agreed by the parties, that the warrant of attorney in question should be given by the three as a security for the debt. The warrant ran in the usual form, authorizing the attorneys therein named to appear "*for us*," meaning the three defendants. The warrant was in fact executed but by two of the defendants, and the third had refused to execute. It was submitted, that as the plaintiff was prevented by one of the parties from obtaining judgment and execution against the three; he was justified in issuing execution against the two who did execute, and that the words "against us" must signify the executing parties. As two of the defendants had endeavoured to evade the security by preventing the third

(*a*) It seems that no judgment could be entered up on the warrant of attorney under these circumstances; not against the three, because one of them had not executed—nor against the two, because the warrant of attorney was only an authority to sign judgment against the *three* defendants. *Gee* v. *Lane*, 15 *East*, 592; *Raw* v. *Alderson*, 7 *Taunt.* 453. In such a case, if the third defendant omitted to execute, the plaintiff should, after a demand of the stipulated security, and a refusal on the part of the defendants to give such security as was agreed upon, proceed in the action as if no warrant of attorney had been given. See *ante* 314.

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HARRIS *against* WADE and STONE.

from executing it, the Court ought not to grant the relief prayed by this rule.

PER CURIAM. The warrant of attorney purports to be given by three persons, authorizing certain attorneys to enter up judgment against "*us*,"—that means *all three*; and if you can only procure the execution by two, and the third refuses to execute, the plaintiff ought immediately to conclude that the warrant of attorney was abandoned, and consider the case as if it never had been made. If it could have been shewn satisfactorily that it was by the management of the other two that the third did not execute, that would present the case in a different shape. The rule must be made absolute without costs, the defendants undertaking not to bring any action.

MARSH *against* BLACHFORD.

Monday, May 17th.

A *testatum capias* by original made returnable at *Westminster*, instead of "wheresoever, &c." held irregular, and Court refused to amend to the prejudice of the bail. (*a*)

F. POLLOCK, on a former day, moved to set aside a special *testatum capias*, and a bail-bond taken thereon, for irregularity, on the ground that the writ

(*a*) So in *Reubel* v. *Preston*, 5 *East*. 291, where the return day in a bill of *Middlesex* was different from the usual form, it was held irregular, although the day of return was equally certain with that in common use: and Lord *Ellenborough* said, there was no reason for departing from the settled form which had been always adopted in describing the return days of the Term in writs, although by computation, the sheriff might know as well on what day to make his return. If the regular known forms were departed from in one instance, a thousand whimsical returns might be framed, and great confusion introduced. But leave was given to amend. But an amendment will not in general be allowed to the prejudice of the bail. And in *Levett* v. *Kibblewhite*, 6 *Taunt*. 483, where the plaintiff having sued out process in debt, declared in case, by which the bail were discharged, the Court refused to amend the declaration by changing it from case to debt. Vide *Kerr* v. *Sheriff*, 2 *Bos.* & *Pul.* 358. So the Court will not amend a clerical error in the spelling of the plaintiff's name in the bailpiece without the consent of the bail. *Bingham* v. *Dickie*, 5 *Taunt*. 814; and recognizance will not in general be amended without the consent of the bail. *Tabrum* v. *Tenant*, 1 *Bos.* & *Pul.*

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MARSH *against* BLACHFORD.

was returnable "at *Westminster*," instead of "wheresoever we shall then be in *England*." On the same day *Chitty* moved for a rule to shew cause why such writ, and all proceedings thereon, should not be amended on an affidavit that the original special *capias* was returnable "wheresoever," &c. Both rules now came on together.

Chitty submitted, that as this Court had so long been holden at *Westminster*, the writ could not mislead the defendant, but on the contrary more certainly pointed out to him where he was to appear; and he referred to several cases to shew that at least in a bail-bond the circumstance of the condition being to appear "at *Westminster*," instead of "wheresoever," &c. was held immaterial. (*a*) The writ was also amendable, according to several other authorities. (*b*)

F. Pollock admitted that in general the process was amendable when there was any thing to amend it by: but he relied on the case of *Inman* v. *Huish*, (*c*) in which it was held that an amendment of a writ made returnable on a day certain, instead of a general return day, could not be made to the prejudice of the bail: and he produced an affidavit on the part of the bail that they concurred in this application.

ABBOTT C. J. I think the case of *Inman* v. *Huish*,

482; 3 *Taunt.* 263. But see *Tidd*, 221. And an amendment in a *scire facias* against bail has been often refused, although it is discretionary in the Court to grant or refuse the amendment. *Fulwood* v. *Annis*, 3 *Bos. & Pul.* 321; *Stevenson* v. *Grant*, 2 *New Rep.* 108; *Mann* v. *Calow*, 1 *Taunt.* 222, 3; *Tidd*, 6 ed. 1142, 3. And see *Carr* v. *Shaw*, 7 *T. R.* 299.

(*a*) *Shuttleworth* v. *Pilkington*, 2 *Stra.* 1155; *Jones*, v. *Stordy*, 9 *East*, 55; *Tidd*, 6 ed. 229. Aliter where, in declaration on bail-bond, it appeared that the writ was returnable in C. P. and bond was for appearance before his Majesty at *Westminster*. *Renalds* v. *Smith*, 6 *Taunt.* 551.

(*b*) *Walker* v. *Hawkey*, 5 *Taunt.* 853; 1 *Marsh*, 399; 2 *Smith*, 392; *Tidd*, 6th ed. 127.

(*c*) 2 *New Rep.* 133, *Tidd*, 6th ed. 126.

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ought to govern our decision, and is not distinguishable from the present case. There the Court refused to allow the amendment of a writ made returnable on a certain day instead of a general return day, although there was an original writ in existence by which it might be amended. The principle upon which that decision went was, that the bail would be affected by such an amendment. It would be a very different thing if the defendant, instead of having given bail in the cause, had sought his liberation, and the plaintiff desired to have the writ amended so as still to detain the defendant in custody; or it would have been a different thing if there had been no third person whose rights would be affected by the decision of the Court. It seems to me therefore that the proper course is to make Mr. *Pollock's* rule absolute without costs, the defendant undertaking to bring no action; and that the rule for the amendment should be discharged without costs.

The rules were disposed of accordingly.

THE HIGHGATE ARCHWAY COMPANY *against* NASH.

Monday, May 17th.

Where an arbitrator awards the damages without any mention of costs, and directs that execution shall not be taken out for the damages, but that they shall be set off against a counter demand of the defendant, the plaintiff's attorney may take out execution for the costs, which by the rule of reference were to abide the event of the award. (a)

THIS was a rule calling on the plaintiff's attorney to shew cause why the execution indorsed to levy the sum of 200*l.* taxed costs in this cause should not be set

(a) In *Figes* v. *Adams*, 4 *Taunt.* 632. where an action was referred to an arbitrator, who awarded the costs of a nonsuit to be paid by one party, and a larger sum to be paid as a debt by the other party; it was held, that the party awarded to pay the smaller sum was entitled to a set-off without motion. In the present case, the arbitrator awarded that the sum which he found due to the plaintiff in this action should be set off against the 15,000*l.* claimed by the defendant in the other action; but as he said nothing about the costs, it is probable he intended that execution might be immediately taken out for them, as it was one of the terms of the reference that they should abide the event. Even where the defendant applies to set off the debt and costs in one action

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aside with costs. The case upon the affidavits was this: the plaintiffs having brought an action against the defendant upon a bond, the cause was referred to the arbitration of a gentleman at the bar, and by the rule of reference the costs were directed to abide the event. The arbitrator awarded to the plaintiffs damages to the amount of 3000*l.* without any direction as to the costs: but there being a cross action depending between the parties, in which the present defendant as plaintiff claimed of the present plaintiffs a sum of 15000*l.* the arbitrator restrained the latter from taking out execution for the 3000*l.* awarded in this action, directing that it should be set off against the defendant's demand of 15000*l.* in the cross action. The plaintiff's attorney entered up judgment, and issued execution for the taxed costs. The question was, whether, under these circumstances, he was at liberty so to do.

Scarlett and *Walford* now shewed cause against the rule, and contended that unless the plaintiff's attorney could take out execution for his costs, he would have no remedy whatever. It was true that the arbitrator had said nothing in his award about costs: but as by the rule of reference the costs were to abide the event, the right to them followed as a necessary consequence of the result, in whatever way the award was made. The arbitrator could have no intention of depriving the attorney of his lien upon the judgment; and his award accordingly did not touch the costs. In whatever way the parties to the cause adjusted their respective claims, the attorney's rights could not be affected.

F. Pollock, in support of the rule, submitted, that

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against those in another, the Court of K. B. will not in general suffer it to be done until the attorney's bill be first discharged. *Middleton* v. *Hill*, 1 *M.* & *S.* 240; *Randle* v. *Fuller*, 6 T. R. 456; 8 T. R. 70, note c; 4 T. R. 123, 4; *Howell* v. *Harding*, 8 *East*, 362; *Tidd*, 6th ed. 330.

as the arbitrator had by his award expressly directed that execution should not be taken out for the original debt of 3000*l.* the proceedings which had been had were in direct breach of the award. The execution was taken out for debt and costs, but the writ was indorsed to levy the costs only. This of itself would be an objection to the proceedings in point of regularity, because they would not correspond with the judgment. It might be true that the costs would follow, as a legal consequence of the award; but he submitted that the costs were so intimately connected with the damages that they could not be severed, and consequently that execution could not be taken out without levying the damages. In the case of *Deacon* v. *Morris* (*a*) it was held, in an action to recover treble damages under 29 *Eliz.* *c.* 4. against the sheriff, for taking more than the fee allowed by that statute on levying under an execution against the plaintiff's goods, and where the question was whether the plaintiff was not entitled to treble costs as well as treble damages, the Court held that the whole of the judgment given was damages, though the judgment was compounded of costs and damages. Here then the debt and costs were so blended together that execution could not be taken out for the one without the other. If then the arbitrator had tied up the hands of the plaintiff from taking out execution for the debt, it followed, as a necessary consequence, that the prohibition extended also to the costs.

ABBOTT C. J. I am of opinion that the execution taken out for the costs is no breach of the award. The award directs that execution shall not be taken out for the sum of 3000*l.* the damages awarded; but it says nothing as to the costs. It is true that the writ of execution is taken out for the debt and costs, but it is

(*a*) 2 *Barn.* & *Ald.* 393. S. C. *ante*, 137.

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indorsed to levy the costs only; which is no breach of the award, because the costs follow as a legal consequence.

BAYLEY J. It is clear that if there had been an application on the part of the plaintiff to set off his claim of 3000*l.* against the claim of the defendant, the Court would take care of the attorney's lien for his costs. (*a*) The only difficulty I had in this case was, how execution could be issued upon the judgment, the judgment being for debt and costs; and how the writ could be indorsed to levy the costs only; but upon reference to the award, that difficulty is removed, and it seems to me that execution might be taken out for the debt and costs, but with a special direction to the sheriff to levy for the costs only. The event of the award is, that the defendant is entitled to receive a balance of 12000*l.* because being bound to pay the plaintiff's 3000*l.* they would be entitled to set that sum off against the 15000*l.* which he claims. Supposing the defendant had obtained judgment in the cross action, and the plaintiffs had set off against that judgment the 3000*l.* given by the award, he could exempt himself from the payment of the costs due to the attorney for the plaintiffs. If the arbitrator thought that by any such arrangement the attorney was to be deprived of his costs, it is highly probable that he would have taken care in his award to settle what costs the defendant ought to pay.

BEST J. The arbitrator appears to have drawn a clear distinction between the debt and the costs; and in my opinion the attorney was entitled to take out execution for the latter.

Rule discharged.

(*a*) *Middleton* v. *Hill*, 1 *M.* & *S.* 240; *Mitchell* v. *Oldfield*, 4 T. R. 123; 6 T. R. 456; 8 T. R. 70 (c); 8 *East*, 362; 2 *H. Bla.* 441.

1819.

Tuesday, May 8th.

The KING *against the* SHERIFFS *of* LONDON, *in a Cause of* PLUMMER *v.* HOUGHTON.

Attachment against the sheriff will be set aside where bail above have been put in, although they were put in by a new attorney on behalf of the bail below, without an order for changing the attorney. (a)

MARRYAT and *Abraham* shewed cause against a rule for setting aside an attachment for irregularity, with costs. Notice of bail had been given by the defendant's attorney; and afterwards, and before any order for changing such attorney, the bail to the sheriff employed another attorney to put in and perfect bail, and who on the 29th of *January*, before any order for changing the attorney, gave notice, on behalf of the bail, of adding and justifying two fresh bail, who accordingly justified on the 1st of *February*; after which, by an order, the attorney who had acted on behalf of the bail was appointed attorney for the defendant in lieu of the former, and on the same day he served the rule for allowance of bail on the plaintiff's attorney,

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(a) Vide Anon. *Mich.* T. 1817, *Nov.* 22, *Selwyn* moved for an attachment against the sheriff for not bringing in the body, on the ground that bail had been put in by a new attorney without any order for changing the attorney. He admitted that it was an unusual motion.—*Abbott* J. said, that this was a new motion, but allowed *Selwyn* to take a rule *nisi*. It is now held that the bail below may put in bail above, or may justify by their own attorney. *Wheeler* v. *Rankin*, *ante* 81; *Keys* v. *Tavernier*, *ante* 291, though a different doctrine formerly prevailed.

Anon. *Mich.* T. 1813. *Twiss* moved for time to justify bail, the bail having been put in by a new attorney, without any order for the attorney being changed. The motion was supported by an affidavit of the circumstances. *Dampier* J. The bail cannot justify, but as the informality appears to be accidental, therefore time may be granted.

So in C. P. where notice of bail was given by one attorney, and the defendant gave notice of new bail by another, without obtaining leave for changing his attorney, it was held, that the plaintiff might oppose the justification of the bail last put in. See *Hill* v. *Roe*, 6 *Taunt.* 532; 2 *Marsh. Rep.* 257. However, it has been held in the Court of Common Pleas, that the bail may appear by their own attorney; and where the defendant's attorney refused to instruct counsel to move that the bail might justify, unless they would pay him his costs, that Court, on the application of the bail, granted a rule for them to appear and justify by their own attorney, in order to prevent an assignment of the bail-bond. *Haggett* v. *Argent*, 7 *Taunt.* 47; 2 *Marsh. Rep.* 365.

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PLUMMER *against* HOUGHTON.

who, on the 7th *February*, issued an attachment against the sheriff. On shewing cause, it was contended that such notice of bail by another attorney, without an order for changing the former, was a nullity. For this it was urged there were several authorities which were decisive upon the point; (*a*) and it was insisted that, supposing the bail below might employ another attorney, he ought to act distinctly for them, whereas in this case the attorney had conducted himself as if he were acting on behalf of the defendant. If different notices of bail by different attornies were permitted, the plaintiff might be put to great trouble and inconvenience in enquiring into the sufficiency of different sets of bail.

Chitty, contrà, submitted, that whatever might have been the former practice, it had been repeatedly held of late that notice of bail might be given by a different attorney, and that bail might be put in by three different parties, namely, by the sheriff, by the bail below, and by the defendant; (*b*) and he referred to the recent case, in which it was ruled that the circumstance of notice of added bail having been given by a different attorney, was no objection to such latter bail justifying. (*b*) Besides, in this case it was distinctly sworn that the notice of justifying the bail was given on behalf of the bail below.

ABBOTT C. J. It is of very great importance that the bail to the sheriff should be permitted to put in bail above for their protection, and that another attorney should be permitted to do the same act as the attorney for the defendant, without a change; and when it sufficiently appears, as in the present case, that the attor-

(*a*) *Kaye* v. *De Mattos*, 2 *Bla. Rep.* 1323; *Macpherson* v. *Rorison*, *Doug.* 217, or 206, 1st ed.; *Hill* v. *Roe*, 2 *Marsh*, 257; 6 *Taunt.* 532; *Tidd*, 6 ed. 85; and see 2 *Marsh.* 365; 7 *Taunt.* 47, S. C.

(*b*) *Ante*, *Wheeler* v. *Rankin*, 81. (Vide *ante* 291.)

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PLUMMER *against* HOUGHTON.

ney who gave notice of the added bail really acted on behalf of the bail and on their retainer, I am of opinion that it is not necessary there should be an order to change the attorney. It is of so much consequence to the bail to the sheriff that they should be allowed to perfect bail above, that I think, whether they employ the defendant's attorney or their own attorney, it is a matter of no sort of importance.

BAYLEY J. It very often happens that bail are put in by the sheriff himself, and it is by no means necessary or essential that the person who puts in bail should be the defendant's attorney. Whoever is the person that puts in bail, how is the plaintiff prejudiced?

Rule absolute, without costs.

BELL *against* THRUPP.

Tuesday, May 18th.

Affidavit to hold to bail "for goods sold and delivered, materials found and provided, and work and labour done and performed by deponent for the defendant," held insufficient, because it did not appear that the goods were sold and delivered *to* the defendant. (*a*)

CHITTY on a former day obtained a rule to shew cause why a common appearance should not be entered, and why the sum of 40*l.* paid into Court, under the statute 43 *Geo.* 3. *c.* 46, in lieu of bail, should not be paid out of Court to the defendant, on the ground of

(*a*) The affidavit is insufficient, if it omit to state that the goods were sold and delivered *by the plaintiff*. *Fenton* v. *Ellis*, 6 *Taunt.* 192; 1 *Marsh*, 535, S. C.; *Taylor* v. *Forbes*, 11 *East*, 315; *Cathrow* v. *Hagger*, 8 *East*, 106; *Perks* v. *Severn*, 7 *East*, 194.—So in *Young* v. *Gatien*, 2 *M.* & *S.* 603, an affidavit to hold to bail, stating that the defendant being master or commander of a ship, was indebted to the plaintiff for work and labour of plaintiff done on board the ship, and for materials found by plaintiff and used therein, and for goods sold and delivered, and money paid by plaintiff at the request of the defendant, was holden to be defective, in not stating that the work was done, or the money paid for, or goods sold *to the defendant*. *Tidd*, 6th ed. 186. But in C. P. an affidavit, stating that the defendant was indebted for the hire of divers carriages of the deponent, hired to and for the use of the defendant, has been held sufficient. *Brown* v. *Garnier*, 6 *Taunt.* 389. So "for work and labour done for defendant" is sufficient, without adding that it was done at his request. *Id. Ibid.* 5 *Taunt.* 756, 704, 751.

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against
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a defect in the affidavit to hold to bail, which stated that the defendant was justly and truly indebted to the plaintiff in the sum of 30*l.* "for goods sold and delivered, materials found and provided, and work and labour done and performed by this deponent *for* the defendant."

Littledale now shewed cause, and contended that the affidavit must have a reasonable intendment, and that as it was sworn that the defendant was indebted to the deponent *for* goods sold, &c. this must be taken to import that there was a debt for which the defendant was liable to be held to bail, and that there was no authority which established that such an affidavit was insufficient.

Chitty in support of the rule referred to *Perks* v. *Severn,* cited in *Cathrow* v. *Hagger,* (*a*) and to other authorities collected in *Tidd's* Prac. 6th ed. 186. He objected that it was not sworn that the defendant was indebted for goods sold *to* him, and that as the word *for* was applicable to the whole sentence, the affidavit must be read, that the defendant was indebted for goods sold *for* him, which rendered the sentence unintelligible. He adverted also to the language of Lord *Ellenborough* in *Taylor* v. *Forbes,* (*b*) that the affidavit must be certain and explicit, and so positive, that in case it were untrue the party making it would be liable to an indictment for perjury. That the strictness required in affidavits to hold to bail is not only to guard defendants against the consequences of perjury, but also those who make the affidavit against any misconception of the law; and that the leaning should be always to great strictness of construction, where one party is to be deprived of his liberty by the act of another.

ABBOTT C. J. The affidavit to hold to bail in this

(*a*) 8 *East.* 106. (*b*) 11 *East.* 316.

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BELL *against* THRUPP.

case imported that the goods had been sold and delivered *for* the defendant, and not *to* him. We cannot proceed upon any intendment in cases of this nature, because the Court must judge of the real import of the words. The Court has often said that they will not reason in a case where the words ought to be precise and positive. The affidavit to hold to bail has the effect of depriving the party of his liberty, and therefore it should be couched in words precise and positive, and ought not to be left to matter of inference or argument. The rule, therefore, must be absolute on the defendant's filing common bail.

Rule absolute accordingly.

ELLIS *against* ——

Tuesday, May 18th.

Service of a bill of *Middlesex*, in the parish of *St. Giles, Cripplegate*, in the city of *London*, sufficient, being on the confines of the adjoining county, and at all events where the process was served on the 3d of *May*, and notice of declaration given on the 10th, an application to set aside the proceedings on the 18th comes too late. (*a*)

DENMAN moved to set aside the service of the bill of *Middlesex* in this cause for irregularity, on the ground that it was served in the parish of *St. Giles, Cripplegate*, in the city of *London*, on the 3d of *May* instant. On the 10th the defendant was served with a notice of declaration, which was filed conditionally.

Per Curiam. The parish of *St. Giles, Cripplegate*, adjoins the county of *Middlesex*, and therefore by the ordinary rule which the Court has laid down as to the service of process on the confines of the county, this

(*a*) Affidavit in support of motion to set aside process, on the ground that it was served in a wrong county, must negative that it was served on the confines of the proper jurisdiction; and must also state, that there was no dispute as to the boundaries. *Twiss* v. *Williams*, ante 15, note (*d*) —— v. *Walters*, ante 14. And see also as to time for moving to set aside proceedings for irregularity in this Court, ante 14, note (*b*) In C. P. where defendant was served on the 25th of *January* with an attachment of privilege in the wrong county; and on the 20th of *May* was served with a notice of declaration, and rule to plead was given on the first day of *Trinity* Term; it was held that the defendant might in that Term apply to set aside the proceedings. *Ledwich* v. *Prangnell*, 1 *Moore*, 299, ante 15, note.

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application would not be well founded; but in all events the defendant comes too late. The service of the bill of *Middlesex* is on the 3d of *May*; notice of declaration is given on the 10th, and this is the 18th, and therefore the application is decidedly too late.

BAYLEY J. With such an objection as this, you you must come in proper time.

Rule refused.

Tuesday, May 18th.

FENWICK *against* FARROW.

The affiadvit to change the *venue* must state what the cause of action is. (*a*) In an action on a bond the Court will change the *venue* from *London* to *Northumberland* in *Easter* Term, on an affidavit stating that all the defendant's witnesses lived there, on the terms of withdrawing the plea *non est factum*.

TINDAL moved to change the venue in this case from *London* to *Northumberland*, on an affidavit, stating that the cause of action arose in the county of *Northumberland* and not elsewhere, and that all the parties and their witnesses lived in that county, and that it

(*a*) Vide also *Roscoe* v. *Delano*, ante 57, and note; where it was held, that the affidavit must state what the cause of action is, or the declaration must be produced, in order to shew that the action is of such a nature as will, according to the practice of the Court, justify the changing of the venue. And the rule of Court, *Trin.* 49 *Geo.* 3. which was made on account of inconveniences having arisen from the venue being improperly changed without adverting to the cause of action, directs that all *rules* for changing the venue shall be drawn up on *reading* the declaration. 11 *East*, 273, ante 57. Courts will not in general change the venue, in an action on a bond, bonds and other specialties being *bona notabilia* wherever they happen to be. *Beavis* v. *Moore*; 1 *T. R.* 782, a; *Pole* v. *Horobin*, *Tidd*, 6 ed. 633. Nor in an action on a charter-party under seal, *Morris* v. *Hurry*, 1 *Moore*, 54. (though in 7 *Taunt*, 306. S. C. it is said that in this case the charter-party was not under seal.) See also *Bradley* v. *Adey*, *Barnes*, 491; *Everest* v. *Sansum*, id. ibid. *Tidd*, 6 ed. 633; but on a special ground being alleged, the Court will change the venue even in an action on a deed; as in an action of debt on bond, where the venue was laid in *London*, and the plaintiff's and defendant's witnesses lived in *Lincolnshire*, the Court of King's Bench changed the venue into the latter county. *Foster* v. *Taylor*, 1 T. R. 781; *Holmes* v. *Wainwright*, 3 *East*, 329; *Watt* v. *Daniel*, 1 *Bos.* and *Pul.* 426, 7; *Tidd*, 6 ed. 635. In *Walton* v. *Hutton*, ante 14, it was held, that the Court would not change the venue from *London* into a northern county in *Hilary* Term, on the motion of the defendant, without an affidavit of merits.

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would be attended with very considerable expense to the defendant to bring his witnesses to *London*. He submitted, that though this was a transitory action, yet the Court would, in justice to the defendant, give him the benefit of having the cause tried in the place where all his witnesses resided; and he cited *Holmes* v. *Wainwright*, (*a*) where it was ruled, that if the cause of action substantially arises in another county than that in which the venue is laid by the plaintiff, and the convenience and justice of the case require the trial to be had there, where all the witnesses reside at a great distance from the county where the venue is laid, the Court, on the application of the defendant, will change the venue, on his agreeing to admit a particular fact, which, in point of form, exists in the original county. In the present case, the defendant was willing to admit the execution of the bond upon which the action was brought. He also referred to *Evans* v. *Weaver*, (*b*) in support of the motion.

The COURT granted a rule to shew cause; and now

Scarlett shewed cause, and objected that the affidavit on which the motion was made did not state what the cause of action was, which he contended it was necessary to do, in order to entitle the defendant to his present motion. According to the affidavit, as it at present stood, there was nothing to be tried. On this ground the rule ought to be discharged.

Tindal, in support of the rule, urged that, according to the practice of the Court, it was quite sufficient to state in the affidavit that the cause of action arose in the county of *Northumberland*, and not elsewhere, with-

(*a*) 3 *East*. 329; *Edie* v. *Glover*, *Tidd*. 6 ed. 635; and per Lord *Alvanley* J. in *Collins* v. *Jacobs*, 3 *Bos*. and *Pul*. 581.

(*b*) 1 *Bos*. and *Pul*. 20.

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out specifying what the cause of action was. The action undoubtedly was upon a bond, to which the defendant had pleaded *non est factum;* but the defendant had a very substantial defence upon the merits, to prove which all the witnesses resided in the county of *Northumberland.*

The Court said, that the objection to the affidavit was well founded; but they were disposed to make the rule absolute, upon the defendant undertaking to withdraw his plea, of *Non est factum,* and go to trial at the next assizes upon the merits.

These terms were agreed to, and

The rule was made absolute.

Tuesday, May 18th.

CLEMENTS *against* STERLING.

After the delivery of the paper book to the clerk of the papers, with a memorandum generally of *Michaelmas Term,* corresponding with the declaration, neither party has a right to amend it by making a special memorandum of the day of the delivery of the declaration, without an order from the Court to amend. (a)

THE writ in this case was issued on the 20th *November* 1818, and on the 27th of the same month, the plaintiff's attorney delivered a declaration entitled generally of *Michaelmas* Term, to which the defendant pleaded, and the issue was completed in this Term, and the plaintiff obtained the paper book from the clerk of the papers, with a memorandum generally of *Michaelmas Term,* corresponding with the declaration; but the plaintiff's attorney, without the permission of the clerk of the papers, or any order to amend, altered the memorandum in the paper book to the *27th of November,* and delivered the same in such altered state to the defendant's attorney, who thereupon restored the paper book to its original state, and returned it: but the plaintiff's attorney said he should again insert the special memorandum on the paper book. *Chitty* on a former day moved that the paper book might be re-

(a) Vide *Doe* v. *Cotterell,* ante 277.

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stored to its original state, when it was obtained from the clerk of the papers, and that the plaintiffs might pay the costs of the application; and referred to the case of *Dickinson* v. *Plaisted*, (a) and *Ethersey* v. *Jackson*, (b) which established the impropriety of making any alteration in the proceedings without an order for leave to amend.

Marryatt now shewed cause upon an affidavit which stated that the plaintiff's attorney had not restored the special memorandum; and that consequently the paper book stood with a memorandum generally of *Michaelmas* Term, and upon which he was content to proceed; and that therefore the object of the motion failed.

ABBOTT C. J. The alteration in the paper book, after it was obtained from the Office, and without any leave to amend, was a very improper act; and though it is stated by the plaintiff's attorney, that he has not persisted in such alteration, yet he does not deny that he gave the defendant's attorney reason to believe that he would persist, and therefore he compelled him to apply to the Court; and consequently the rule must be absolute.

BAYLEY J. The defendant was entitled to a declaration of *Michaelmas* Term; and the defendant agrees to accept it. It is delivered on the 27th of *November*; but the plaintiff's attorney has no right to make a special memorandum of the day of its delivery, after the paper book is made up, without an order for leave to amend.

Rule absolute.

(a) 7 *T. R.* 474. (b) 8 *T. R.* 255.

KEY *against* HILL.

Monday, May 17th.

Where the assignee of a bail bond brought

E. LAWES on a former day obtained a rule to shew cause why the proceedings in three actions on the

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separate actions thereon, without suggesting any sufficient reason for so doing, the Court stayed the proceedings in all the actions against the bail, upon payment of the costs of one, under the construction of 4 and 5 *Ann.* c. 16. s. 20. *Abbott* C.J. *dissentiente.* (a)

bail-bond in this cause should not be stayed, upon payment of costs of one of the actions to be taxed by the Master, bail above having justified.

Comyn now shewed cause, and contended, as well upon the principle of the common law as upon the 4 and 5 *Ann*, c. 17. s. 20. that the proceedings in this case could not be stayed on payment of the costs of one action. A bail-bond could not be distinguished from any other joint and several bond, and consequently the plaintiff had a right to sue all the parties separately. The 4 and 5 *Ann*, c. 16. s. 20. authorized the assignment of the bail-bond given by the sheriff to the plaintiff. On such an assignment taking place, the assignee by the authority of that act might bring actions against all the parties thereto. It was true that the act enabled the court wherein such actions were brought, by a rule or rules, to give such relief to the defendant in the original action and to the bail upon the bail-bond, as was agreeable to justice and reason, and

(a) It certainly has been supposed that a plaintiff has a right to bring separate actions on a bail-bond. In *Tidd*, 6th ed. 294, it is thus laid down: "And where *several* actions are brought on a bail-bond, it is usual, in suing out execution, to apportion the debt and costs in the original action amongst the different defendants, so as to levy a part on each, together with his own costs." In *Walker* v. *Carter*, 2 *Bla. Rep.* 816, where several actions were brought on a bail-bond, on motion to stay the proceedings in one action on payment of the debt and costs of that particular action, the Court, on considering precedents, held that the costs of the actions against the principal and the other bail must also be paid before proceedings could stay. See also *Tidd*, 6th ed. 563; 1 *Sel. Prac.* 187. 1st ed.; *Hullock*, on Costs, 2d ed. 628. There may be cases, especially where the debt is large, in which it may be advisable not to bring a joint action on the bail-bond, in which, if one of the parties should die, all remedy at law against his effects will be gone, and a Court of Equity would not relieve against a surety. See cases *Bac.* Ab Obligations, D. 4.; and id. 7 vol. 506; 3 *Vesey* J., 566. A plaintiff may bring several actions against the bail above on their recognizance, *Tidd*, 6th ed. 1108. If several actions be brought at the same time against several parties to a bill, the Court will not stay proceedings at the instance of the acceptor except on terms of his paying the costs of all the actions. *Smith* v. *Woodcock*, 4 *T. R.* 691; *Windham* v. *Wither*, *Stra.* 515; *Golding* v. *Grace*, 2 *Bla. R.* 749; *Tidd*, 6th ed. 562.

that such rule or rules should have the nature and effect of a defeazance to such bail-bond or other security for bail. But it did not appear that there had ever been any rule laid down applicable to the present case; and however anxious the Courts have been to restrain the practice of bringing several actions upon the same bail-bond, a doubt had always been entertained whether under the authority of this act the Court had a power to put such an interpretation upon its provisions as to prevent the assignee from proceeding against the several parties to the bail-bond. From the time of the passing of that act, the universal practice had been, that where more than one action was brought, the proceedings could not be stayed, but upon the payment of the costs of all the different actions. If therefore the practice of the Court had been such, and no precedent had been established to the contrary, this was not the time to raise a question which would tend to disturb a practice which had prevailed for more than an hundred years. It was impossible for the other side to cite any instance in which the Court had upon the payment of costs of only one action stayed the proceedings as to the rest. The assignee of a bail-bond had a statuteable as well as a common law right to bring actions against all the parties to a bail-bond, upon the principle which prevailed with respect to ordinary bonds for the security of money. It could not be disputed, that where a joint and several bond was entered into by different persons, the obligee had a common law right to enforce the obligatory engagement against each of the parties by separate actions, and to recover separate costs against each party. The Court would recollect that this was an application to stay the proceedings in three several actions against the obligors of a bail-bond, on payment of the costs of one action only. It was not to be disputed that either of the parties in such actions might apply for a stay of proceed-

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ings upon the payment of the costs in his own action.(a) But it was incompetent for one of those parties to come to the Court, and ask for a stay of proceedings in all the actions upon the payment of costs in one. If, however, the Court had power to lay down such a rule, the Court would do so; but standing upon the common law, as well as statuteable right of the plaintiff, and in the absence of any precedent upon the subject, it was submitted that the Court ought not now, for the first time, to lay down a rule so inconsistent with the universally acknowledged practice in cases of this nature.

E. Lawes, in support of the rule, contended that the statute of 4 and 5 *Ann* gave the Court a discretionary power of restraining the assignee of a bail-bond from bringing more than one action. Undoubtedly there must be some special circumstances laid before the Court to induce them to exercise such a discretion. The case in question presented such special circumstances, because nothing could be suggested on the ground of urgency or necessity, to warrant actions against all the several parties to the bail-bond. Cases might certainly occur, in which it would be reasonable for the assignee to bring actions against all the parties, as for instance in the event of the insolvency of some of the parties to the bond. But inasmuch as the sole object of the bond was to secure to the plaintiff the payment of his debt, there could be no necessity for bringing several actions against all the parties, where there was no suggestion of insolvency against the obligors. Nothing but absolute necessity could warrant such proceedings. The plaintiff in the actions could be in no way benefitted by the accumulation of such proceedings, and the only person that could derive ad-

(a) Sed vide *Walker* v. *Carter*, 2 *Bla. R.* 816, *ante* 338, 9, note.

vantage from them was the attorney, who certainly had an interest in increasing the amount of the costs in each of the actions. There being no necessity in this case for more than one action, the Court, by virtue of the discretion given them by the statute, were bound to interpose their authority, and stay the proceedings in all the actions on payment of the costs of one.

ABBOTT C. J. The act of parliament on which the Court is now called upon to pronounce an interpretation, has now been passed for more than a century. The practice of bringing several actions upon the bail-bond (and which has prevailed for a long series of years) has on repeated occasions met with strong expressions of disapprobation on the part of the Court. But no instance has been cited in which the Court has refused to allow the plaintiff the costs of the different actions brought upon the bail-bond; and as far as the Court is informed, this is the first occasion on which they have been called upon to put a different construction upon this act of parliament. The act of parliament does seem to contemplate but one action, for it says, "that after the sheriff has taken bail upon a writ or other process issued against a defendant, he may assign the bail-bond or other security taken from such bail, and that the plaintiff after such assignment may bring *an action and suit* thereupon, in his own name." But I think that cannot confine the plaintiff absolutely to one action, and oblige him to bring an action against one person only; for in the result the first action might fail, and he may reasonably bring a subsequent action for the same cause. It seems to me therefore that the words of the act do not necessarily confine him to one action. Then the act goes on to say, "that the Court wherein such action is brought may, by rule or rules of the Court, give such relief to the plaintiff and defendant in the original action, and to the bail upon the bond,

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or other security taken from such bail, as is agreeable to justice and reason; and that such rule or rules shall have the nature and effect of a defeazance to such bail-bond or other security for bail." I confess it strikes me that the meaning of this part of the clause is, that the Court is to give such relief to the parties as shall be consistent with justice and reason; that is to say, when bail has been put in so recently after the arrest as to entitle the plaintiff to insist on the forfeiture of the bail-bond, but suffers nothing from it, the Court may grant such relief to the defendant as is agreeable to that justice and reason which is contemplated by the legislature. I am more confident in this construction, because it is said by the legislature that the rule of Court is to have the nature and effect of a defeazance of the bond; which seems to me to import that the legislature meant only to give to the Court the power of relieving the party from the forfeiture of his bond on the payment of the costs of that action, but that they did not intend this power to extend to the costs in cases in which more than one action was brought. It has been truly said, that by the common law a party may bring actions against each of the parties to a joint and several bond. Although this is very improperly done in cases of this nature, yet I cannot say that it is done illegally. This question being now for the first time raised, after so long a period has elapsed since the passing of the act, and when the attention of the Courts has been from time to time called to complaints of this nature, I do not feel myself at liberty to say that we can in this instance deprive the plaintiff of his costs in all the actions, though I must confess that I am extremely sorry no construction has been put upon the act authorizing a different conclusion; because I should have been extremely willing to follow up a precedent of that nature. But as no such construction has been put upon the act, I do not feel myself warranted in establishing the precedent.

BAYLEY J. There is no irregularity in the course of legal proceedings which more urgently requires legislative interposition than the practice of bringing several actions on a bail-bond. The fact of the existence of this practice does not furnish a ground for the interference of the Court in this case, unless the words of the act of parliament under consideration gives us the power of so interfering. But the circumstances of oppression which may arise in a particular case, will, in my judgment, justify the Court in adopting such a rule of construction upon these words of the 20th section of the 4th and 5th *Ann*, as will be calculated to meet the oppression. By the common law, no action could be brought on the bail-bond except by the sheriff; but by the 20th clause of the 4th and 5th *Ann*, the bail-bond is assignable, and it gives the assignee the power of suing upon such bail-bond, and it certainly uses the word "*an* action." I do not, however, place any great reliance upon that, because I am quite clear that the plaintiff in the cause is at liberty to bring separate actions on the bail-bond, notwithstanding the word *action* is here used. But it seems to me that, by the subsequent words of the clause, if the plaintiff brings more than one action, and cannot give any reason to the Court when called upon for bringing more than one, the Court is warranted and bound to give such relief to the defendants as is consistent with justice and equity. The clause says, that the assignee may bring an action upon the bail-bond, and the Court may, by rule or rules of the same Court, give such relief to the plaintiff and defendant in the original action, and to the bail, as is agreeable to justice and reason, and that such rule or rules of the said Court shall have the nature and effect of a defeazance of such bail-bond or other security for bail. Now, it seems to me that when there are several actions brought, and the party applies to the Court to stay the proceedings, the Court has a right to call upon

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the plaintiff to assign some sufficient reason why he brings more than one action. If he can give such reason, then it is consistent with justice and reason that the Court should not stay the proceedings, but upon the condition of paying the costs of all the actions. But if, upon the question being put to him, he can give no reason why he has brought more than one, then I think the Court is warranted and bound to confine him to the costs of one. In this case, what necessity was there for bringing more actions than one? The plaintiff, in effect, says, "I have brought three actions instead of one, not because the debt was in hazard; not because I was afraid of ultimately recovering the money, but because I chose to put into my pocket the costs of three actions instead of one." No man can doubt that such a practice ought to be reprobated; but if it ought to be reprobated, is it not competent for the Court so to do, and tell the party who resorts to such a practice, "We will reprobate that conduct, by confining him to those costs which were alone necessary costs of obtaining the real substantial justice of the case." Therefore, as it seems to me, the words of the act, giving to us the power of making a rule of Court, and such order in the case as is agreeable to justice and reason, are sufficient to comprehend the case before us. There can be no necessity for bringing three actions to recover the same debt, and unless some satisfactory reason is given for bringing more than one action, I think the reason and justice of the case call upon us to stay the proceedings, upon payment of the costs of only one of the actions.

HOLROYD J. The only doubt I had in this case was, whether we were precluded by the practice which has prevailed for so long a period of time, from relieving the parties under the clause in question, upon the payment of the costs of one action only; because, certainly,

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in point of practice, the usage has been to come to the Court and obtain relief upon payment of the costs of the three actions; and if there had been a case in which the present question had been made upon an application to stay the proceedings upon payment of the costs of one action only, and the Court had decided otherwise, I think I should have felt myself bound by the decision. But no case of that kind has been cited; and as we are now for the first time called upon to put a construction upon this part of the statute, I think we should give it such a construction as is consistent with reason and justice. From the best consideration I can give to this clause, it appears to me that we are called upon to give the relief which is now prayed; and I do not see why we are to be shut out from such a construction, merely because no decision has taken place, to stay the proceedings upon paying the costs of one action only. I can see no good reason for bringing three actions, if one would answer the purpose, the object being to recover the debt. It does not appear that the plaintiff would be in a worse situation by bringing one instead of three actions; and if that be so, I think it but reasonable that he should have the costs only of one. It appears to me that by so deciding, we should be only consulting that justice and reason which this statute entitles us to extend to the party complaining. That being the result of my opinion upon this subject, I think we are bound to make this rule absolute.

BEST J. If there had been any settled practice upon the subject, whatever my inclination might have been, I should have felt myself bound by it; but I understood whilst the case was under discussion at the bar that there never has been any decision upon the subject, in which the Court have said, that the proceedings were not to be stayed upon the application of any party, except on the payment of the costs in all the actions.

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I cannot find that there ever has been any such decision, and that being so, I can find nothing like a practice. I know that a practice, which I have always thought an abominable one, has prevailed, of attorneys bringing three actions upon the bail-bond, and taking advantage of the distresses of persons for the purpose of putting treble costs into their pockets. But that is a practice which the Court has never sanctioned; on the contrary, the Court have always expressed their disapprobation of it whenever the subject has been incidentally mentioned. It is true that the question has never been brought before the Court in a tangible shape until now, but the Court have not been insensible to the gross impropriety of such a practice, and have invariably expressed their disapprobation of it. We are now called upon for the first time to say whether we shall consent that that shall be recognised as the practice of the Court. I cannot for one say that I will recognise it, unless I am bound down so to do by the express words of the act 4 & 5 *Ann.* But I think that the Court are not prevented by that act from giving that judgment which is consistent with the substantial justice of the case. We are to give such relief to the party as is agreeable to justice and reason; and I think that we are not called upon to put a narrow construction upon these words, but, on the contrary, I think we are bound to put the largest construction that the words are capable of receiving, for the purpose of advancing that justice which the legislature had in view. Putting that sort of construction upon them, I conceive we are entitled to consider whether, under the circumstances of the particular case, it was fit that three actions should have been brought, if only one was sufficient. If it was fit that three should have been brought, then I think we could not consistently with justice and reason stay the proceedings in any one until the costs of all three had been paid. But as it does not appear to us to have been ne-

cessary that three should have been brought, but that on the contrary, ample justice could have been obtained by bringing one, I think we are called upon by the words of this act to relieve the parties upon payment of such costs only as, under the circumstances of the case, it was necessary for the plaintiff to incur. It occurs to me that there is but one case in which it could be necessary to bring more than one action, and that is where one of the parties is gone out of the kingdom. But that is not the case here, for it appears upon the affidavits that two of the writs were served in one day, and the other served on the following day. Under these circumstances it could not be necessary that three actions should be brought. The plaintiff could have obtained ample justice in one action, and he would have had the same security for his debt by one as by three actions. What reason can the ingenuity of any man suggest for bringing more than one action? The only reason that can be suggested is that of giving the attorney an opportunity of putting more costs into his pocket than he could by bringing one, without in the smallest degree benefiting his client, but on the contrary, placing him in a situation in which he may be called upon to pay his own costs in some of the actions. It has always occurred to me that there is no practice more absurd and injurious than this has been; and it appears to me that the Court is called upon to prevent its continuance as far as in it lies. I am of opinion therefore that the proceedings in this case must be stayed upon payment of the costs of one action.

Rule absolute.

The KING *against* The SHERIFFS of MIDDLESEX, *in a Cause of* BROWN *against* WETHERELL.

Tuesday, May 18th.

Affidavit for setting aside a regular attach-

MEREWETHER on a former day applied for a rule to set aside the proceedings on an attach-

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ment against the sheriff must in terms comply with the rule of *Mich.* Term, 59 *Geo.* 3. An affidavit on behalf of bail for setting aside attachment, which did not state that the application was made for the *only* indemnity of the bail, and at their expense, was held bad. But time was given to obtain a proper affidavit. (*a*)

ment regularly obtained against the sheriff, on payment of costs, upon an affidavit which stated that the application was made on behalf of the bail, for *their indemnity*, and without any collusion with the original defendant.

E. Lawes now shewed cause, and contended that the affidavit was not a full compliance with the rule of Court of last *Michaelmas* Term, inasmuch as it did not state that the application was made on the part of the bail, and for their *only* indemnity, nor did it state that it was made at their expense.

Merewether in support of the rule contended that the affidavit on which he moved was a sufficient compliance with the rule of *Michaelmas* Term last, in having stated that the application was made by the bail for their indemnity, and without collusion with the original defendant. It was not necessary to state that it was made at their expense, because if it was not, that would be in collusion with the defendant, and would be at variance with the statement in the latter part of the affidavit. The affidavit was positive that the application was made for the indemnity of the bail, and that was sufficient.

ABBOTT C. J. The affidavit does not state that the application is made for "their *only* indemnity,"

(*a*) The rule is in the following words :—Regula Generalis. It is ordered, that from and after the last day of this present Term, no rule shall be drawn up for setting aside an attachment regularly obtained against a sheriff, for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail bond, unless the application for such rule shall (if made on the part of the original defendant) be grounded upon an affidavit of merits, or (if made on the part of the sheriff, or bail, or any officer of the sheriff) be grounded upon an affidavit, shewing that such application is really and truly made on the part of the sheriff or bail, or officer of the sheriff (as the case may be) at his or their own expence, and for his or their "*only*" indemnity, and without collusion with the original defendant. By the Court.

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and the word "only" is an important word in the rule, nor do you say that it is at their own expense.

Merewether suggested that his client was in a condition to swear an affidavit in literal compliance with the rule, and therefore prayed the indulgence of the Court to be allowed to amend the affidavit.

ABBOTT C. J. My learned brothers are of opinion that the rule ought to be enlarged until to-morrow, to give time for the production of a supplemental affidavit; but I confess I should have been disposed not to grant the indulgence, because the party has not thought proper in the first instance to comply with the terms of the rule, and because if we granted any indulgence in this case, we should be invited over and over again to do the same thing in other cases. The rule, however, must be enlarged until to-morrow, in order that a supplemental affidavit be produced.

On a subsequent day *Merewether* produced another affidavit, and the Rule was made absolute in the terms prayed.

STEVENSON *against* CASTLE.

Tuesday, May 18th.

A writ of *ca. sa.* varying from the judgment in the sum recovered, may be amended on shewing cause against a rule for setting it aside, on payment of costs, and defendant to bring no action.

E. *LAWES* on a former day obtained a rule to shew cause why the defendant should not be discharged out of custody, and the *capias ad satisfaciendum*, on which he was imprisoned, should not be set aside for irregularity, with costs, on the ground that the judgment as recited in the *ca. sa.* was for 38*l.* (which was in fact the amount of the debt) when the judgment signed on a warrant of attorney was for 80*l.*

Puller now shewed cause, and contended that the

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Court would amend the writ on the authority of the case of *Newnham* v. *Law*. (*a*)

HOLROYD J. adverted to a case where a similar amendment had been allowed when the defendant was in execution after a writ of error brought; and

The COURT discharged the rule on payment of costs

(*a*) 5 T. R. 577. In that case, one of two plaintiffs died before interlocutory judgment, but the suit went on to execution in the name of both; after which, and after a motion to set aside proceedings for this irregularity, the Court permitted the plaintiff to enter a suggestion on the roll of the death of the other before interlocutory judgment, and to amend the *ca. sa.* without paying costs. So the Court has in former cases allowed the sum in a *capias ad satisfaciendum* to be amended and made to accord with the judgment. *Mouys* v. *Leake*, 8 T. R. 416, note (*a*). So where a judgment was affirmed in the Exchequer Chamber with costs in error, and both defendants were taken under a writ of execution for the whole sum, including the costs of the writ of error, when the writ was only brought by one defendant, the Court permitted the plaintiff to amend his writ of execution as to the defendant who did not join in the writ of error, by altering it to the original sum recovered; and Lord *Kenyon* said, the justice of the case requires that we should permit the plaintiff to amend; if the defendant had indeed suffered by the excess of the execution, that might vary the case, but here he has sustained no damage. In *Laroche* v. *Wasbrough* and another, 2 T. R. 739, it was held, that a *testatum capias ad satisfaciendum* might be amended and made conformable to the judgment in the description of the cause of action, and that an original *ca. sa.* might be sued out to warrant such *testatum*. *Shaw* v. *Maxwell*, 6 T. R. 450. So a *ca. sa.* may be amended in the name of the plaintiff, *Mackie* v. *Smith*, 4 *Taunt*. 322; or in the name of defendant, 2 T. R. 738, 9. And a *ca. sa.* returnable in the wrong Court may be amended, 2 *Bla. Rep.* 836; and a *ca. sa.* in the Common Pleas returnable before "us" instead of "before the king's justices at *Westminster*," may be amended on shewing cause against a rule for setting aside the execution, *Simon* v. *Gurney*, 1 *Marsh*. 237. And in *Tidd*, 6th ed. 1036, 1065, it is laid down, that if the *ca. sa.* be informal, it may be amended in like manner as a *scire facias*. In C. P., where the plaintiff did not pray leave to amend till time of shewing cause against a rule for setting aside proceedings, the Court obliged him to pay the costs of that application, because he ought to have applied to amend in the first instance, as soon as the service of the rule *nisi* apprized him of his mistake. 4 *Taunt*. 322. 1 *Marsh*. 237. But where a *ca. sa.* was indorsed to levy the penalty in a warrant of attorney for securing the payment of an annuity, the defeazance of which only authorized an execution for the arrears, the Court, upon a motion to set aside the execution, made the rule absolute, and would not refer it to the Master to ascertain what was due, and detain the defendant for that sum. *Tilby* v. *Best*, 16 *East*. 163. But in general, when a writ of execution has been taken out for too large a sum, the Court will only quash it as to the excess. *King* v. *Harrison*, 15 *East*, 615.

by the plaintiff, the defendant undertaking to bring no action; and gave leave to amend the execution, though no previous motion for that purpose had been made.

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STEVENSON *against* CASTLE.

JEFFRY'S *Bail.*

Wednesday, May 19th.

Where in bail by affidavit the names of the bail were omitted in the notice of justification, through the neglect of the attorney in the country, the Court gave two days' time to serve fresh notice, there being no suggestion that the omission was for the purpose of delay. (*a*)

BAIL by affidavit. The defendant in giving notice of the justification of bail to the agent in town omitted to mention the names of the bail, which consequently could only have been ascertained by having recourse to the bail-piece at the Judge's chambers, and thereby give the agent in town additional trouble in inquiring after the bail and ascertaining their sufficiency.

F. Pollock applied for two days time to give the agent in town a fresh notice, containing the names and

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The christian names of the bail must be inserted in the notice of justification, as well as in the notice of their being put in.

(*a*) See *Taylor* v. *Halliburton*, *Mich.* Term 1814, *Nov.* 22.—*Lawes V.* moved to justify bail. It appeared that the Christian names of the bail were inserted in the notice of bail being put in, but omitted in the notice of justification; and it was contended that this omission was immaterial. But *Le Blanc* J. said, it was always usual to insert the christian names of the bail in the notice of justification as well as the notice of bail being put in, and therefore held it insufficient. There does not appear in print to have been any prior determination upon this point in the King's Bench. In the Common Pleas, where bail are regularly put in and excepted to, the defendant need not describe them by their *additions* in the notice of justification. *England* v. *Kerwan*, 1 *Bos.* & *Pul.* 335; 1 *Tidd*, 260, 279. So it seems in K. B. the notice of justification ought to contain the addition of the bail. Anon. *Hilary* T. 1815. *Saturday*, *Feb.* 4th. *Andrews* opposed the justification of bail, on the ground that the notice of justification did not contain the trade or business, or degree of the bail, but only stated their places of abode.—*Bayley* J. Sufficient notice was given to enable the plaintiff to find them out. The objection is critical, and time ought to be given if the bail are now rejected. It is unreasonable to make them come up again.—Whereupon the plaintiff consented to waive the objection.—But the Court will allow time to amend where there is a wrong Christian name in the notice of justification of bail. *Anon.* *Hil.* T. 1815.

The notice of justification ought to contain the addition of the bail, but time will be granted for the purpose of inserting the addition.

Comyn moved to justify one of the bail, the other being described in the notice of justification by the christian name of *Thomas* instead of *John*.—The COURT allowed one to justify, and gave time for the name to be altered, and the same bail to justify at a future day.

The Court will allow time to amend and justify where there is a wrong christian name in the notice of justification of bail.

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residences of the bail, suggesting that the omission in the first notice had arisen from a clerical mistake.

HOLROYD J. said that if there was any reason satisfactorily made out to the Court for believing that this omission was designed for the purpose of delay and gaining time, he should not grant the indulgence; but as nothing of that kind was suggested, he should not refuse the application. Two days time were given.

Wednesday, May 19th.

The KING on the *pros.* of MILLS *against* —— BRICE.

A prosecutor conducting his case in person, and who is to be examined as a witness in support of the indictment, has no right to address the jury in the same manner as counsel. (*a*)
No new trial can be granted in a criminal case, where the defendant has been acquitted. (*b*)

THIS was an indictment against the defendant for perjury, alleged to have been committed by him in giving evidence on the trial of a civil action. At the trial before *Abbott* C. J. on *Saturday* the 15th instant, at *Guildhall*, a verdict was found for the defendant.

The prosecutor in person now moved for a rule to shew cause why the verdict of acquittal should not be set aside, and a new trial granted, on the ground that the learned Judge had refused to allow him to address the jury in stating the case for the prosecution, he having declared that he intended to be examined as a witness.

ABBOTT C. J. It is no ground for a new trial that

(*a*) See the practice stated, 1 *Chitty's* Crim. Law, 555; but the prisoner may address the jury, ibid. 623, and authorities there cited.

(*b*) Same point on an indictment for not repairing a road. The *King* v. *Mann*, 4 *M.* & *S.* 337; *Rex* v. Inhabitants of *Chigwell*, 1 *Barn.* & *Ald.* 67; *Rex* v. Inhabitants of *Wandsworth*, 1 *B.* & *Ald.* 63. Yet the Court under very special circumstances in those cases, suspended the entry of judgment after a verdict for the defendant, so as to enable the parties to have the question reconsidered on another indictment, without the prejudice of the former judgment. See also *Rex* v. *Reynell*, 6 *East*, 315; 2 *Smith*, 407; 4 *Bla. Com.* 361; *Cowp.* 37; 2 *Burr.* 664; 6 T. R. 638; 1 *Chitty's* Crim. Law, 657.

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THE KING *against* BRICE.

a prosecutor, examined as a witness on the trial of an indictment, has not been permitted to address the jury by way of making a statement of his case. It is sufficient that he is allowed to give his evidence on oath. Counsel have a privilege in this respect, from their education, habits of business, and that sound discretion which they may be supposed to exercise, in not stating any thing which it would be unfit for the jury to hear. They also stand in a different situation from a prosecutor conducting his case in person, because they are to a certain degree under the check and control of the Court, and are tied down by rules to which probably another person would not be subjected. It is quite clear that a prosecutor, being to be examined as a witness, has no right to address the jury, or make any statement but upon oath.

BAYLEY J. A criminal prosecution, carried on in the name of the King, is for the interests of the public, and not for the gratification of the private objects of individuals, and therefore a prosecutor who proposes to offer himself as a witness is only to be examined upon oath, and has no right to address the jury in the same manner as counsel. I remember an instance in which the late Chief Justice of this Court suffered a person who conducted a prosecution without counsel to address the jury. The subject was afterwards mentioned to him, and he was convinced that no person but counsel had that right.

HOLROYD J. There is no doubt that a prosecutor has no right to address the jury, and also to be examined as a witness. The prosecutor here appears to have been examined as a witness, and he ought not to be suffered to address the jury.

BEST J. It would be extremely improper to allow

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THE KING against BRICE.

the same person who was to give evidence as a witness, to deliver a speech to the jury, pregnant perhaps with matter which ought not to be stated.

ABBOTT C. J. The prosecutor has now the opinion of all the Judges of this Court upon this subject, and I was desirous that he should have that opinion for the sake of the public. But there is another decisive objection to this motion, which I did not chuse to mention in the first instance, viz. that no new trial can be granted after a defendant has been acquitted, unless on the ground of a misdirection of the Judge.

Rule refused.

Thursday, May 20th.

GREEN *against* HARTLEY.

In bail by affidavit, where time was given to answer affidavit on the part of the plaintiff, that bail was prisoner for debt; Held that defendant could not give notice of, and justify fresh bail, before affidavit was answered. (a)

BAIL by affidavit.—On a former day the justification of bail was opposed on the ground that one of the bail, at the time the notice was given of his justification, was in execution in *York* Castle for 1200*l.* Defendant's attorney obtained time to answer the affidavit of opposition, but instead of doing so, he gave notice of another bail, in lieu of the person confined in *York* Castle; and

BEST J. said that this was irregular; that he could not permit the substituted bail to justify. For the defendant's agent had no right to give notice of fresh bail, until he had answered the affidavit of opposition to the former bail.

Leave granted to defendant to put in fresh bail when plaintiff had been allowed to inquire into the sufficiency of the former.

(a) Vide *Anon. Mich.* T. 1818. *Monday, Nov.* 16.—BAIL having answered doubtfully to some questions put to them on their justification on a former day, time had been granted, on the application of the plaintiff, to inquire into the facts, on which they had given evasive answers. On the part of the defendant it was now moved, that added bail might justify, whereupon *Chitty* objected that time was only allowed to the plaintiff to inquire into the facts sworn to on the former day. But *Bayley* J. said, that the defendant ought upon the plaintiff's applying for time to inquire, to be at liberty to put in another bail.

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Thursday, May 20th.

ANONYMOUS.

In an action upon a bill of exchange with the money counts, defendant pleaded, 1st. *Non assumpsit;* 2dly. To the first count, that the bill was in the hands of a third person; and 3dly, to the other counts, that an account had been stated, and that plaintiff's claim arose in respect of an outstanding bill; Held, that Court would not give leave to plaintiff to sign judgment as for want of a plea. (a)

ANDREWS moved for a rule to shew cause why the plaintiff should not be at liberty to sign judgment in this case under the following circumstances. The declaration was upon a bill of exchange against the defendant as acceptor, and there were the usual money counts. The defendant pleaded first, the general issue, *non assumpsit,* and for further plea to the first count, that the bill of exchange had been indorsed over by the plaintiff to a third person to whom the defendant was liable; and to the other counts he pleaded that there had been an account stated between him and the plaintiff, and that the sum of money claimed to be due was in respect of a bill of exchange which the plaintiff had indorsed to one *George Green,* to whom the defendant was alone liable. These pleas, he contended, were of such a nature as to entitle the plaintiff to sign judg-

(a) In *Thomas* v. *Smithies,* 4 *Taunt.* 668, the Court of C. P. refused to quash a plea in abatement, because it was insensible, saying that they would not try the validity of a demurrer on motion. That it had been held, that when a plea was quite nonsense, the plaintiff might sign judgment, but it was at his own peril. See also *Gray* v. *Sidneff,* 3 *Bos.* and *Pul.* 398; *Samuels* v. *Dinne,* 3 *Taunt.* 386. But where it is doubtful whether the plea can be treated as a nullity, it is the safest course not to sign judgment, but to demur, or move the Court to set the plea aside. *Horsfall* v. *Matthewman,* 3 *M.* & *S.* 154, 5. *Deshons* v. *Head,* 7 *East.* 383, 4. *Hickey* v. *Burt,* 7 *Taunt.* 48, 9. *Jones* v. *Herbert,* 7 *Taunt.* 421. *Rucker* v. *Hannay,* 3 T. R. 124. *Tidd,* 6 ed. 590—488, 9. In *Thellusson* v. *Smith,* 5 T. R. 152. it was held, that where a defendant who was under an order to plead issuably, delivered a plea which, though informal, went to the substance of the action, the plaintiff could not sign judgment as for want of a plea; and the Court said, that if the plea could not be supported, the plaintiff should have demurred instead of signing judgment. Where indeed a plea has on the face of it appeared to be pleaded for the purpose of delay, the Court has in some cases gone the length of saying, that the plaintiff might treat it as a nullity. But this plea is not of that kind, for it goes to the substance of the complaint, though whether it be a formal and good plea it is not necessary to consider; if it be bad, the plaintiff must demur, and a rule absolute was granted for setting aside the judgment which had been signed for want of a plea.

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ment, because they were obviously for the purpose of delay.

HOLROYD J. said, he could not see upon what ground the plaintiff could sign judgment as for want of a plea. The plaintiff, if he thought fit, might demur to the pleas, but it could not be said that these were nullities, nor did they lead to different trials. If they were to be considered as nullities, the plaintiff might sign judgment, but it must be at his own peril.

Rule refused.

Friday, May 21st.

THOMPSON'S *Bail.*

Where two days' time to justify is given, if bail are not justified on the last of the two days, an attachment may issue on that day. (*a*)

BAIL not attending to justify on the fourth day, two days further time was given to justify other bail. On the second day, no bail having justified, the plaintiff moved for an attachment against the sheriff, which *Reader* moved to set aside, on the ground that the defendant had the whole of the second day to render, and that therefore the attachment ought not to have been moved for till the next day, according to the case of the King against the Sheriff of *Essex*. (*b*) But

When rule to bring in the body expires on the last day of Term, an attachment against the sheriff may be moved for at the rising of the Court on that day.

(*a*) By rule *Mich.* 32 *Geo.* 3. it is ordered that in future all writs shall be returned by the sheriff on the day on which the rule for returning the same shall expire, and in default thereof the plaintiff shall be at liberty to move for an attachment on *the next day*, 4 T. R. 496; but if the rule expire on the last day of Term, the plaintiff may move for an attachment at the rising of the Court on that day. The *King* v. *Sheriff* of *Surry* in a cause *Martin* v. *Hobbs*, *Mich.* T. 50 *Geo.* 3. In a country cause, a rule to bring in the body was given on the 15th of *June*. The Term expired on the 21st, and on that day, at the rising of the Court, an attachment was moved for. *Bolland* moved to set it aside for irregularity, on the ground that the rule was a six-day rule and the sheriff had the whole of the day to bring in the body, so that it could not be moved for on that day. *Rex* v. *the Sheriff* of *Berkshire*, 5 *East*, 386. The *Attorney General* and *Comyn* shewed cause; and *per Curiam* rule for setting aside the attachment discharged. 11 *East*, 591. *Tidd*. 6 ed. 298.

(*b*) Cited 7 T. R. 528. And see the *King* v. the *Sheriff* of *Middlesex*, 8 T. R. 464. *Tidd*, 6th ed. 302.

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Per Cur. The Court gave time to justify, not to render; and as bail were not justified within the time given, the plaintiff ought to be in the same situation as if the bail had not regularly justified on the fourth day.

Rule for setting aside the attachment discharged.

THE KING *against* THE SHERIFFS OF LONDON, *in a Cause of* DUVAL *against* HENDERSON.

Friday, May 21st.

Attachment against the sheriff is not to stand as a security on the ground that plaintiff has lost a trial, unless it appear that he has lost such a trial as would have entitled him to judgment of the same Term. Action by original differs from action by bill as to time of obtaining judgment, the jury process in the former being returnable on a general return day; and therefore, though the plaintiff in an action by original might have tried his cause at the *last* sitting in this Term, yet as judgment could not be obtained until next Term, he had not lost a trial within the true import of that term. (*a*)

COMYN shewed cause against a rule obtained by *Chitty* on a former day for setting aside an attachment against the sheriff on payment of costs, and in-

(*a*) Vide *Phillips* v. *Whitehead*, *ante* 270; and as to meaning of the term *trial*, see *Gravett* v. *Williams*, 4 T. R. 352. (*a*) and note to that case. See also *Rex* v. *Sheriff* of *Sussex*, in a cause of *Snow* v. *Heather*, *Mich.* T. 54 *Geo.* 3. Motion to stay proceedings on an attachment on payment of costs: The action was by original, and the writ was returnable on the first day of Term. The sheriff on that day was ruled to return the writ, and on the 15th served with the rule to bring in the body. No bail was put in until the 22d, nor perfected until the 25th. *Espinasse* objected that the attachment ought to stand as a security to the plaintiff for the sum recovered. He contended that a trial had been lost, inasmuch as if bail had been put in within the four days after the return, the plaintiff could have tried the cause within the Term.

Bayley J. asked how far the defendant lived from *London*; and being answered, at *Worthing*, the COURT directed that the attachment should not remain as a security, as no trial had in fact been lost. The defendant was not bound to perfect his bail within the four days, and had four days after the exception, and living more than 40 miles from *London*, was entitled to 14 days notice of trial, and therefore no trial having been lost, the attachment ought not to remain as a security. Rule granted for staying proceedings on payment of costs, and the attachment not to stand as a security. See also *Adams* v. *Thompson*, *Nov.* 9, *Mich.* 45 *Geo.* 3. *Wigley* moved to stay proceedings on the bail-bond, the bail having justified. He observed, that the writ was of last Term, and therefore of course no trial could have been lost. *Espinasse*, on behalf of the plaintiff, insisted that the proceedings ought only to be stayed on the terms of the defendant's accepting a declaration, pleading issuably, and taking short notice of trial. He cited *Tidd's* Practice, 293. The Court, however, granted the rule; and the Master stated that the plaintiff was not entitled to any such terms, and could only insist on the payment of costs.

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sisted that the attachment ought to stand as a security, because a trial had been lost. The process being by original was returnable on the first general return day of the Term, and plaintiff declared *de bene esse*, but bail was not perfected in due time. He urged that the plaintiff might have tried his cause at the last Sittings in Term in *Middlesex*, which were appointed for this day.

Per Curiam. As the process is by original and not by bill, the plaintiff has not lost a trial according to the true import of that term, namely, a trial in and judgment of the Term; the process being by original, the *distringas*, which must be returnable on a general return day, could not be returnable until the next Term, and consequently there could not be judgment of the Term. If a trial took place at the last Sitting, judgment could not be obtained until the next Term. Trial means in fact such a trial as would give judgment of this Term.

Comyn then urged that the defendant ought to take short notice of trial for the Sittings after Term.

Chitty submitted that these terms ought not to be imposed, as the motion to set aside the attachment was made on behalf of the officer, who had no control over the defendant; but the Court said the terms were reasonable, and the rule was made absolute accordingly.

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THE KING *against* THE SHERIFFS OF LONDON, *in a Cause of* DAY *against* MORLEY.

The bail-bond will be directed to stand as a security where a trial has been lost, and there-

MARRYAT shewed cause against a rule obtained by *Chitty* for setting aside proceedings on a bail-bond on payment of costs, insisting that the bond ought to stand as a security, on the ground that the writ was

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THE KING *against* THE SHERIFFS OF LONDON.

against two defendants, returnable early in *Hilary* Term, and one only of the defendants was arrested, so that the plaintiff could not declare *de bene esse*, and that the other defendant was arrested on an *alias* returnable this Term. (*a*) It was submitted that the plaintiff had lost a trial, as the proceedings were by bill; and the plaintiff might, if bail above had been perfected in due time in this Term, have declared in chief and tried his cause at the last Sittings, and have obtained a judgment of the Term.

fore, where one defendant was arrested on a *latitat* returnable in *Hilary* Term, and the other on an *alias* returnable in *Easter* Term, and if bail above had been duly perfected, plaintiff might have tried the cause at the last Sittings in *Easter* Term; Held, that the bail-bond must stand as a security.(*a*)

The COURT said, that as one defendant had been already arrested on a writ returnable in *Hilary* Term, the plaintiff could not have declared *de bene esse* on the last process, and therefore no laches were imputable to the plaintiff; and as the proceedings were by bill, a trial and judgment of the Term had been lost, and therefore the bail-bond must stand as a security.

Rule absolute on these terms.

(*a*) If two defendants are sued by bailable process, and one of them is arrested in the Term of which it is returnable, but the other cannot be met with, so that it becomes necessary to take out another writ against him returnable in the next Term, as the plaintiffs cannot declare till both defendants are in Court, they are neither of them entitled to an imparlance on account of the plaintiff's not declaring until the Term in which the latter defendant is arrested. *Imp.* K. B. 8th ed. 266. *Tidd*, 6th ed. 483.

THE KING *against* THE SHERIFFS OF MIDDLESEX, *in a Cause of* PHILLIPS *against* DORE.

Friday, May 21st.

ON a former day a rule was obtained calling on the plaintiff to shew cause why the attachment against the sheriff in this case should not be set aside with costs to be taxed by the Master.

It is not necessary that an affidavit should be made of service of the notice of render, in order to complete the render so as to prevent an attachment against the sheriff, and an attachment issued

Manning now shewed cause, and contended that the attachment was regular, on two grounds. On the 8th inst. the rule to bring in the body expired, and on

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after notice of render, but before affidavit thereof, is irregular. Nor is it necessary to make an entry of the *committitur* in the marshal's book. And the rule for the attachment was discharged with costs. (*a*)

the same day the defendant was rendered. Notice was given to the plaintiff's attorney of the render, but no affidavit was made of the service of such notice of render, as required by the rule of Court, 33 *Geo.* 3. (*a*) This he contended was in the first instance a sufficient ground of attachment against the sheriff for not bringing in the body.

ABBOTT C. J. It is not necessary to make an affidavit of the render until it is called for, and then it is filed in the office. The affidavit is only necessary in order to get the bail-piece out of the office.

BAYLEY J.. I have never known it acted upon in practice. I have known of the entry of the render on the file, but I never knew that the affidavit was an essential part of the render.

ABBOTT C. J. The affidavit is not necessary in order to make the render complete, so as to discharge the bail, but it may be for some other purposes.

(*a*) Rule, *Trin.* 33 *Geo.* 3. 5 T. R. 368. Whereas by the present practice of this Court, the bail put in for the defendant in any action cannot render such defendant after a rule has been granted against the sheriff to bring in the body before such bail have justified themselves in open Court; It is ordered, that from and after the last day of this Term bail shall and may be at liberty to render the defendant, notwithstanding such rule, at any time before the expiration thereof, the attorney for the defendant giving notice of such render to the plaintiff's attorney without delay, *and making affidavit thereof.* And by rule *Trin.* 1 *Ann, Reg.* 2. it is expressly ordered, that where any defendant in any action here in Court depending shall be rendered into the custody of the marshal of this Court in discharge of his manucaptors, the attorney for such defendant shall without delay give notice of such rendering to the plaintiff's attorney, and *shall make affidavit thereof* before the bail in that action shall be filed or discharged, and in default thereof such rendering shall be void. *Tidd*, 6th ed. 281; and see the form of affidavit, *Tidd's Forms*, 4th ed. 125. Such an affidavit is not necessary in C. P. *Imp.* C. P. 549. *Tidd*, 6th ed. 281. There is no rule of Court requiring an entry of the render in the marshal's book; but in note (*a*) to Rule *Trin.* 3 *Ann*, it is said to be usual to make an entry of the render in the marshal's book kept in the King's Bench Office. *Tidd*, 6th ed. 282, 3.

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Manning then submitted as his second point in support of the attachment, that there had been no entry of the *committitur* of the defendant made in the marshal's book as required by the Rule of Court, *Trinity* 8 *Ann*; and which was necessary, because until then the marshal would not be liable to an action for an escape. Until the *committitur* was entered in the marshal's book, the marshal was not answerable for the safe custody of the prisoner. The act of entering the *committitur* was, by the Rule of Court referred to, directed to be done by the defendant or his attorney, and until that was done the plaintiff could not have recourse to the marshal in the event of an escape.

The COURT then called upon *Archbold* to answer this objection. He contended that an entry of the *committitur* in the marshal's book was not necessary to complete the render. It was not necessary in order to discharge the bail, much less was it to charge the marshal. Formerly, entries were made in this book of the render of defendants, in order that the plaintiff might have an opportunity of seeing whether the defendant was rendered before he took any further proceedings. Afterwards a rule of Court was made in *Trinity*, 1 *Ann*, ordering that notice of render should be given to the plaintiff's attorney, but since then the entries in the marshal's book were merely made for the convenience of the marshal himself, in order that he might readily see what persons were charged in custody. Sir *James Burrows*, in the case of *Hutchins* v. *Kendrick*, (*a*) speaking of the marshal's book, says, "That it is a book of no authority, and only meant for the marshal's convenience, that he may readily see what persons are charged in custody; so that it is (in truth and reality) only a memorial of the defendant's being

(*a*) 2 *Bur*. 1049.

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charged in custody of the marshal, and not the cause or foundation of such charge and detainer." [ABBOTT C. J. *Tidd* says, (*a*) "The only remaining circumstance necessary for discharging the bail in the King's Bench is to make an entry of the render in the marshal's book, kept in the King's Bench Office,' it being holden that until such entry be made, the defendant is not in custody so as to charge the marshal with an action of escape;" and for this he cites 1 *Salk.* 272; 2 *Stra.* 1215, 1226; 2 *Burr.* 1049; and 2 *Smith*, R. 243.] In 2 *Sell.* 126, it is stated to have been decided expressly by Lord *Kenyon*, that such an entry was not necessary. The question in the case of *Hutchins* v. *Kendrick*, (*b*) was merely as to the manner in which a prisoner was to be charged in execution. But it was there said the marshal's book was a book of no authority, and therefore whether the entry was made or not is a matter of no importance. [ABBOTT C. J. It ought to be done, as it strikes me, or else the plaintiff has nothing but the notice of render by which he is to be governed; and that may or may not be true. He must take for granted that it is true, unless he has an opportunity of looking into the marshal's book, and if it is entered, there he will find it.] The entry in the marshal's book is the last thing done, but the plaintiff has notice of the render instantly. [ABBOTT C. J. The *committitur* should be entered promptly, or as soon as may be. HOLROYD J.* By the rule of 3 *Ann*, (*c*) a copy or note of

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(*a*) *Tidd*, 5th ed. 274.; 6th ed. 282, 3.

(*b*) 2 *Bur.* 1049.

(*c*) The words of the rule are as follows; *Trin.* 3 *Ann.* It is ordered, that where any person shall render himself here in Court, or before one of the Justices of this Court, in discharge of his manucaptors, or shall be brought here in Court upon a writ of *habeas corpus*, or before the Justices aforesaid, in order to be committed to the custody of the marshal of this Court, such *reddidit se*, or writ of *habeas corpus*, together with the return thereof, shall be left with the secondary of this Court, or the Judge's clerk before whom such person was rendered or brought, to be filed; and that a *copy or note of such rendering*, or return of the writ of *habeas corpus*, under the hand of such Justice or the secondary, shall be delivered to the marshal of this Court at the

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the render is to be delivered to the marshal at the time of the commitment, and that copy or note is to be made and prepared by the person rendering himself, or by his attorney on his behalf.] The original itself is delivered to the marshal at the time the defendanat is rendered. It is given along with the prisoner, and entered with the clerk of the papers. [BAYLEY J. The plaintiff's attorney has a right to see whether there has been such a render as to enable him to act, if no effectual render has taken place. It seems to be the rule that the *committitur* must be entered in the marshal's book, in order to charge the marshal.] In addition to the cases already cited, the case of the *King* v. the Sheriff of *Middlesex*, (*a*) was an authority to shew that the marshal's book was only adopted for the convenience of the parties. [ABBOTT C. J. The rule of 3 *Ann*, (*b*) does not, *in terms*, require the entry of the *committitur* in the marshal's book. BAYLEY J. This seems to be clear: the commitment is left with the marshal when the prisoner is lodged in custody, but there is this distinction with respect to a prisoner removed from the King's Bench to the Fleet: If a man is to be charged in execution, the *committitur* is taken along with him, and it is entered with the clerk of the judgments, if he is a prisoner in the King's Bench, but if he is removed to the Fleet, he is taken to the Judge's chambers, and carried from thence to the latter, and it is not necessary that there should be an entry lodged with the clerk of the judgments.]

ABBOTT C. J. after conferring with the other Judges, and looking into the cases before referred to, said, We think the attachment is irregular, and there-

time of the commitment of such person to his custody, and such copy or note shall be made and prepared by the person so rendering himself or prosecuting such writ of *habeas corpus*, or by his attorney on his behalf.

(*a*) 2 *Smith*. 243.

(*b*) Ante, 362, note (c).

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fore that the rule should be discharged with costs; but if, after looking into the matter further, we see any reason to alter our opinion, we shall signify the same to-morrow. On the following day,

On render in discharge of bail the *committitur* is made out by the Judge and sent with the defendant to the K. B. prison. The entry in the marshal's book is made by the clerk of the papers.

Where defendant is already in custody of marshal, and is sought to be charged in a new action, *committitur* is entered with the clerk of the judgments. (*b*)

BAYLEY J. said, I have looked into the authorities referred to in *Tidd* upon this point, but I do not find that any of them bear him out in the observation he has made. On inquiring into the practice, I find it to be this:—When the bail bring the defendant to the Judge's chambers to be rendered, the Judge makes out a *committitur*, and that *committitur* is delivered, together with the prisoner, to the tipstaff, who carries him to the King's Bench prison, and there delivers the prisoner and the *committitur* to the marshal or his officer. (*a*) It is the duty of the clerk of the papers there to make an entry in the marshal's book. The case of a *committitur*, referred to in *Tidd's* Practice, is a *committitur* in a very different stage of the proceedings; as, where a man is previously in the custody of the marshal, and it is wished to change the character of his commitment, he being previously in execution, then it is necessary to enter the *committitur*; but the *committitur* is not entered with the clerk of the marshal but is entered with the clerk of the judgments, for the purpose of being referred to when the custody is changed. (*b*) In that case the *committitur* is given in

(*a*) Vide *Tidd*, 6th ed. 279, 280. The form of the *committitur* is as follows: In the King's Bench, *A. B.* plaintiff, and *C. D.* defendant, (to wit) *C. D.* the above defendant did this —— day of —— 18—, render himself (or was rendered) in discharge of his bail at the suit of the above plaintiff, and was thereupon committed by Mr. Justice —— to the custody of the marshal, &c. there to remain until, &c. *Tidd's* Forms, 4th ed. 124.

(*b*) In *Tidd's* Practice, 6th ed. 363, 4. it is said, that in order to charge a prisoner *in execution*, when he is already detained in the K. B. prison, a *committitur* piece should be drawn up on unstamped parchment in the form of a bail piece, and filed with the clerk of the judgments, in order that he may enter the *committitur* on record. And that it is usual before this is done, to enter the *committitur* in the marshal's book, kept at the King's Bench office.

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Where defendant is removed by *habeas corpus* from the Fleet prison to the K.B. no *committitur* is entered.

charg eto the marshal, because there is no document left with the marshal, unconnected with the entry in his book. When the party is not in the custody of the marshal, but is in the custody of the warden of the Fleet, and is brought up by *habeas corpus* for the purpose of being removed from the Fleet, in order to be charged in execution in the King's Bench, the course of proceeding is, that the party is brought to the Judge's chambers, and the Judge makes out the *committitur* by *habeas corpus;* he is then carried with the *habeas corpus* to the King's Bench prison, and then it is not necessary to make any entry of the *committitur.* (*a*) It

Hutchins v. *Henrick,* 2 *Burr.* 1049. is referred to. And it is usual for the clerk of the judgments, at the end of every Term, to send to the marshal a docket or list of the *committiturs* which have been entered in that Term, stating therein the names of all the plaintiffs at whose suit the defendant is charged in execution, from which docket or list an entry is made by the marshal. *Tidd,* 6th ed. 365. With respect to a render in discharge of bail, it is laid down, that where the defendant is a prisoner, he must be brought up by writ of *habeas corpus cum causâ,* and upon this writ, which may be granted as well where the defendant is in custody on a criminal charge as under civil process, the Court will either remand the defendant to his former custody, or commit him as a prisoner of the Court to the custody of the marshal. *Tidd,* 279, 280.

(*a*) Vide 1 *Salk.* 272. 12 *Mod.* 583. *Watson* v. *Sutton.* So if a defendant be removed, after the plaintiff has declared, to the Fleet prison, the mode of *charging him in execution* in the King's Bench is by writ of *habeas corpus (ad satisfaciendum)* returnable in that Court on a day certain in Term, and such writ is a good cause of detainer. Rule *Mich.* 1654. sec. 7. and note (*b*) *Trin.* 2 *Geo.* 1. In the case of *Wigley* v. *Jones,* 5 *East.* 440. (which was an action for an escape,) where the defendant had been arrested on mesne process, and was removed by *habeas corpus* from the custody of the sheriff to the custody of the marshal, the proof given in support of the *habeas corpus* and commitment was the production of the *habeas corpus,* with the *committitur* annexed, which were produced by the clerk of the papers of the King's Bench prison, with whom, as the servant of the marshal, such documents are deposited. And in *Cooper* v. *Jones,* 2 *M.* & *S.* 202. the Court discharged a rule, calling upon the marshal to file of record a writ of *habeas corpus cum causâ,* by virtue of which a person had been brought before a Judge of this Court, and thereupon committed by him to the custody of the marshal, in execution, at the plaintiff's suit; and the Court said, that after diligent search it had not been found that any such writs of *habeas corpus,* with *committiturs* thereon, had ever been returned to, or filed, or kept by the Court or any of its officers, at *Westminster* or elsewhere, except in the office of the clerk of the papers in the King's Bench prison, but that the writ had always remained, as

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seems to us, therefore, that the rule for setting aside the attachment should be made absolute.

Manning said, he hoped the Court would not discharge the attachment with costs, the practice being so uncertain.

BAYLEY J. You take out the attachment at your peril. It is a harsh mode of proceeding. You know the defendant is surrendered, and you get every thing the party can give, namely, the body.

Rule for attachment discharged with costs.

any other warrant naturally would, in the hands of the officer to whom it was immediately directed, and whose voucher or authority for the act of detaining the party it properly was.

Saturday, May 22d.

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The preparation of plans and maps for the purpose of carrying an enclosure into effect, is no evidence of an allotment under the act, which requires an appeal against an allotment to be made within six months after the cause of complaint has arisen, and it suffices to appeal within six months from the time when the conclusive allotment has been made. (*a*)

CHITTY on a former day moved for a rule to shew cause why a *mandamus* should not issue, commanding the Justices of *Middlesex* to enter continuances and proceed to hear and determine at the next Sessions, an appeal which had been lodged by Mr. *Mangnall* on the 9th of *January* last, being within six calendar months, as he stated, after the cause of complaint against an allotment under the 58 *G.* 3. *c.* 1. for inclosing certain land in the parish of *Cranford*, had arisen. The affidavit upon which the motion was founded stated, that the commissioner, on the 18th *June* 1818, shewed a map to the party aggrieved, setting out the land allot-

(*a*) But where, by the 13th *Geo.* 3. *c.* 78. *s.* 19. an order of justices has been made for stopping up a road, an appeal is given to "the party aggrieved by any such order or proceedings, &c. at the next quarter-sessions after such order made, or proceedings had," &c. it was held, that at all events an appeal to the sessions next after the actual obstruction of the road, was too late; the party having had sufficient notice of the *order* in time to have appealed to a preceding sessions, before which time the surveyors of the highways had begun to stop up the road. The *King* v. the Justices of *Pembrokeshire*, 2 *East*, 213.

ted to him, but that the party aggrieved objected to such allotment, on the ground that it was very distant from his estate, and that as the land was then cropped with corn, its dimensions and quality could not be ascertained, and that he expected that such objection would be taken into consideration; that on the 18th of *August* following, he received a formal notice that the land so pointed out in the map was allotted to him, and the commissioner on the same day staked out the land as the party's allotment. It further appeared, that the roads were not set out until the end of *July*, and that, according to the local act as well as the General Inclosure Act 41 *G.* 3. *c.* 109. *s.* 8. no allotment ought to be made until the roads had been set out; that the appeal being lodged on the 9th *January*, was respited until the 29th *April*, when it was opposed and dismissed, on the ground that the appeal ought to have been lodged within six months from the 18th *June*. It was submitted to the Court, that according to the case of The *King* v. the *Justices* of *Wilts*, 13 *East*, 352. it was sufficient to appeal within six months from the time when the allotment was formally complete, either by an award or by an actual staking out of the ground, and that the mere mapping, which might afterwards have been abandoned, was not an act against which the party was bound to appeal.

Vaughan Serj. now shewed cause on affidavits which stated, that the map was shewn to the party complaining, by the commissioner, on the 18th *June*, as his final decision upon the allotment; and denied that any ground was held out to the party for expecting any alteration; and that the only reason why the allotment was not staked out sooner than the 20th *August*, was the circumstance of the land being cropped. He therefore submitted that the appeal was too late.

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Chitty, in support of the rule, was stopped by the Court.

ABBOTT C. J. I think there is no difficulty in arriving at the proper conclusion in this case. The circumstance of plans and maps having been prepared, is by no means conclusive evidence of an actual allotment. They are only preparatory steps, and until they are adopted and acted upon substantially and with effect, no allotment takes place. Mere mapping is not sufficient to ground a complaint.

BAYLEY J. was of the same opinion.

HOLROYD J. Laying down a plan merely preparatory to what is proposed to be done is not sufficient to bind the parties. There may be subsequent reasons for varying the actual allotment from the plan laid down, as sufficient causes arise. Until an act is done founded upon the plan, and the fact itself of setting out the land is performed, the party is not concluded. There is no actual setting out here, according to the true construction of the act. (*a*)

Rule absolute.

The Court granted a peremptory rule for the attorney who resisted the *mandamus* to file the affidavits used on shewing cause, on the morrow.

Chitty, on the following *Monday*, moved for a rule to shew cause why the attorney for the parties who had opposed the issuing of the *mandamus* should not produce the affidavits used on shewing cause to the proper officer, in order that the same might be filed, without which the rule absolute for the *mandamus* could not be drawn up. This application was founded upon an affidavit, that there were several affidavits, which, after the rule had been made absolute, had been taken from the Court, and that the solicitor had declined deliver-

(*a*) *Best* J. having been concerned as counsel for one of the parties on a former occasion, declined giving any opinion.

ing them to the officer till he had consulted his counsel.

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The COURT granted a peremptory rule for the attorney to produce the affidavits at the Crown Office on the morrow, in order that the same might be filed, and the same were produced accordingly.

BINNS *and* WIFE *against* PRATT *and* ANOTHER, *in Error*.

Saturday, May 22d.

A writ of error *in fact* may be brought in the same Court in which judgment was given, or in any other Court, except in the Exchequer Chamber. If a writ of error be brought by a feme covert without joining her husband, the Court will not allow an amendment of the writ, unless it appear by affidavit that the husband concurs. The Court will not amend *mesne* process by adding another person's name as plaintiff. (*a*)

THE original action in this case was assumpsit in the Court of Common Pleas against the defendant's wife as executrix of *Stephens;* she pleaded in that action in person and not by attorney, and suffered judgment by default, which was entered against her in the usual form as executrix for the debt, and for 29*l.* 15*s.* costs, to be levied of the estate of the deceased, and if no assets, then of her proper goods. Upon this judg-

(*a*) Upon a judgment against a feme covert alone, she and her husband must join in a writ of error, 1 *Rol. Abr.* 748. *Sty.* Rep. 251. 280. Upon the statute 5 *Geo.* 1. *c.* 13. it is become the practice to amend the writ of error as a matter of course without costs, by *striking out* the name of one of the plaintiffs in error, *Tidd,* 6th ed. 1191. But there is no instance there given of introducing a new name of a fresh party in a writ of error, and in general the name of a fresh plaintiff cannot be added to process.

Adamson v. ———, &c. *H.* T. 1815. *January* 23d. *Richardson* moved for a rule to shew cause why the writ issued in this action should not be amended by introducing the name of another person as plaintiff.—The *Court* said, that such a rule could not be granted.—*Richardson* then applied for leave to discontinue this action, on payment of such costs only as would not apply to the new action; but Lord *Ellenborough* Ch. J. asked if any precedent could be produced for such an application; and on *Richardson* answering in the negative; Lord *Ellenborough* Ch. J. said: We cannot grant the rule, for otherwise we may be applied to to amend the writ by adding one, two, or three names thereto, and in effect a new action would be introduced by this expedient of amending. Rule refused.—*Tidd,* 6th ed. 162.

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ment she brought a writ of error in this Court in her own name without joining her husband in the *writ*, and she and her husband assigned her coverture as error, and the defendant in error filed the usual joinder. It having been discovered that the writ of error ought to have been issued in the joint names of the husband and wife,

Selwyn on a former day moved for a rule to shew cause why the writ of error should not be amended, and the husband's name introduced in the writ, and contended that the Court had jurisdiction to permit such amendment under the terms of the 5 *Geo.* 1. *c.* 13. entitled an Act for the Amendment of Writs of Error, and which provide "that all writs of error wherein there shall be any variance from the original record, *or other defect*, may and shall be amended and made *agreeable to such record* by the courts when the writ of error shall be made returnable;" and he cited the *Sword Blade Company* v. *Dempsey*, 2 *Stra.* 692; and *Verelet and another* v. *Raphael*, *Cowp.* 425. in which case writs of error brought in the name of several persons, were amended by striking out the name of one of them, and where Lord *Mansfield* said the words of the act are general, "other defects," and therefore if there were any doubt they ought to be extended as far as possible, because it is for the furtherance of justice.

Chitty, contrà, submitted, *first*, that a writ of error being in the nature of a commission, is not amendable at common law, because no Court was ever allowed to amend its own commission, 2 *Saund.* by *Serjt. Williams*, 101, n. (1) *a*; and that the above statute did not apply

(*a*) *Ante*, 369, note

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to a case of this nature, and the decisions were distinguishable from the present, because there the name of a party was *struck out*, in order, in the terms of the act, to render the proceedings agreeable to the record; in those cases there was something to amend by, but the present application was not merely to amend the writ of error so as to render it agreeable to the form of the record, but to introduce a new party, and the Court had no antecedent proceeding by which to introduce such amendment—that a writ of error is to be considered as the commencement of a new action, according to the case of *Clarke* v. *Rippon* and another, 1 *Barn.* and *Ald.* 586; and it is clear, that if this were the case of mesne process, an amendment by introducing the name of an additional plaintiff could not be permitted. *Adamson* v. ——— *Hil.* T. 1815. (*a*) *Secondly*, it was contended that coverture being an error in fact, the writ of error should have been brought in the same Court in which the judgment was given, and not in this Court. The distinction in this respect is between errors in fact and errors in law. Where the Court itself has pronounced a wrong judgment in point of law, it would be neither decent or proper to require that Court to revise its own judgment, and therefore the writ of error in that case must be brought before a higher tribunal. But in cases of error in fact, such as coverture or infancy, when no mistake would be imputable to the Court itself, the writ of error must be brought in the same Court in which the judgment was given, not only because such Court is perfectly competent to decide upon the new matter to be laid before it, but because it would be improper to take the cause out of that Court when no real error had taken place in their judgment. He referred to *Com. Digest.* tit.

(*a*) *Ante*, 369, note (*a*).

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Pleader, 3 *B*. 1. and cases there cited, and where it is laid down—"For error in fact, the writ of error shall be brought in the same Court where the judgment was given, as that the defendant appeared by an attorney, being an infant, that the plaintiff was a *feme* covert, or died before issue," &c. 1 *Roll*. 747. b. 5. 20.; and for error in fact it must be in the same Court, 1 *Siderfin*. 208; *Hopkins* v. *Wrigglesworth*, 2 *Lev*. 38. where in error in the Exchequer upon a judgment in the King's Bench the original defendant assigned error in fact, and the plaintiff pleaded in *nullo est erratum*, and *Hale* C. J. held that such writ of error did not lie out of the Court of King's Bench. [BAYLEY J. A writ of error in respect of coverture may in general be brought in the same Court in which the judgment was given, or in another Court, except in the Court of Exchequer Chamber, where there is no jury to try an issue in fact.]

The COURT suggested a compromise upon terms that the defendant in error should accept the debt without costs; and now the plaintiffs in error having declined such adjustment, the Court inquired whether there was any affidavit that the husband concurred in the writ of error, and upon being answered in the negative, the Court said that they would not give leave to amend; and therefore the

Judgment was affirmed.

Saturday, *May* 22d.

BROWN *against* GILLIES.

Rule for allowing of bail discharged with costs to be paid by defendant, on affidavit that bail had perjured himself on his

ON a former day, *E. Lawes* obtained a rule calling on the defendant to shew cause why the rule for the allowance of bail in this case should not be discharged, and the costs of the opposition to them and of the application be paid by the defendant, his attorney or bail,

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BROWN *against* GILLIES.

Justification, in swearing that an action in which he had been bail had been compromised. (*a*)

on an affidavit stating that one of the bail was interrogated in the Bail Court, whether he was not liable as bail in another action for 460*l.*, when he deposed that that action had been settled by paying 50*l.* and giving bills payable at a future day for the remainder; but it now appeared by the affidavit of the plaintiff and his attorney in the former action, that the deposition of the bail was wholly untrue.

Marryat on a subsequent day shewed cause on an affidavit of the one bail only, stating that he had been informed by the defendant in the former action, and he therefore believed, that it had been settled in the manner he had stated.

The COURT thereupon ordered the rule to be enlarged until this day, to give the bail an opportunity of offering themselves to be again examined as to their sufficiency, and they not having done so, the Court now made the rule absolute, and directed that the defendant should pay the costs.

Rule absolute accordingly.

(*a*) See *Waterhouse's* bail, ante, 307; *Gould* v. *Berry*, ante, 143; *Curtis* v. *Smith*, ante, 116. n. (*a*) It has been held, that when bail are opposed an affidavit of the bail's insufficiency cannot be produced after questions have been put to them. *Anon. Hil.* T. 1818, *Jan.* 23. *E. Lawes* opposed the justification of bail, and after having examined them, proceeded to produce an affidavit respecting their insufficiency; but Mr. *Platt* said, that the affidavit could not be read, after any question had been asked of the bail; and *Holroyd* J. assenting to this rule, refused to receive the affidavit.

When bail are opposed, affidavit of their insufficiency cannot be read after questions have been put.

In the case of bail by affidavit, the bail will not be allowed to justify if an affidavit be produced on the part of the plaintiff that they have declared themselves to be insufficient. *Anon. Hil.* T. 1816, *Jan.* 23.—In bail by affidavit, the plaintiff produced a counter affidavit of the declaration which the bail had made of their own insufficiency; and *Le Blanc* J. rejected him; but on *Campbell* stating that the defendant had informed him that the bail had sufficient property, *Le Blanc* J. allowed the defendant time to file fresh and precise affidavits of the bail's property.

Bail by affidavit not allowed to justify, the plaintiff producing an affidavit of the declarations which the bail had made of their own insufficiency. But time allowed for bail to file fresh affidavits.

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Notice of exception to bail, entitled by mistake "in the Lord Mayor's Court," instead of "in the King's Bench," a nullity, and attachment against sheriff was in consequence set aside. (*a*)

ANONYMOUS.

MUNROE shewed cause against a rule for setting aside an attachment against the sheriff, which had been obtained on the ground that the notice of exception to the bail in this case was entitled in the Lord Mayor's Court, instead of the King's Bench, and he insisted that this notice could not be treated as a nullity, and that consequently the attachment was regular.

Comyn, in support of the rule, was stopped by

HOLROYD J. who said that this was no notice at all, and could only be treated as a nullity.

Rule absolute.

(*a*) It is no exception against bail, until the plaintiff gives notice of the exception. *Oldham* v. *Burrell*, 7 T. R. 26; *Mich.* 8 *Ann.* 1709. Reg. 2, not. *a*; *East.* 2 *Geo.* 2; *East.* 5 *Geo.* 2, Reg. 1; *Tidd.* 6th ed. 262. As to the entitling of notices in general, see 2 *Stark.* 17.

Saturday, May 22d.

BRADSHAW *and* ANOTHER *against* DAVIS.

An *alias capias* directed to the sheriffs of the city of *Chester*, instead of the chamberlain of the county palatine, directing him to issue his mandate to the sheriffs, is irregular, and may be set aside at the instance of the defendant, and the Court refused to allow the writ to be amended. (*b*)

COTTINGHAM on a former day moved for a rule to shew cause why the writ of *alias capias* should not be quashed, and the subsequent proceedings set

(*b*) The same point was decided in this Term in the Court of Common Pleas, in *Bracebridge* v. *Johnson*. See the forms of jury process to the city of *Chester*, *Tidd's* Forms, 4th edit. 281, 329. In *Grant* v. *Bagge*, 3 *East*, 128, it was held, that the writ of *fieri facias* directed, in the first instance, to the bailiff of the Isle of *Ely* out of the Court of K. B. is erroneous and void; and that the bailiff executing the same is guilty of a trespass against the party whose goods are taken in execution; and that, in this case, the process should have been to the sheriff of *Cambridgeshire*, directing him to issue his mandate to the bailiff of the franchise. In *Lil.* Prac. Reg. tit. County Palatine, 1 vol. 1st ed. 357. it is stated "that some part of the county of *Chester* is not within the county palatine of *Chester*, *Mich.* 22 *Car.* 1. B. R.; but the author adds, *quære* as to what part." With respect to the city of *Chester*, it is laid down in

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aside with costs, upon an affidavit that the defendant, on the 26th of *February* last, was served with a copy of the *alias capias* directed "*To the Sheriffs of our city of* Chester *and county of the same city*," which he contended was irregular, because such process should have been directed to the Chamberlain of the county palatine of *Chester*, commanding him by his mandate to

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Com. Dig. tit. Franchises, D. 4, that the city of *Chester*, though a county of itself, is part of the county palatine; and 4 *Inst.* 212. is cited, where four of the Judges are said to have delivered it as their opinion, in a resolution presented to the queen, A.D. 1658, that the county of *Chester* (*wherein the city of Chester* is now and by a good time past hath been a county of itself) of very ancient time before the reign of king *Hen.* 3. hath been and yet is a county palatine, with other members thereunto belonging, and so from time to time hath been received and allowed as law. So in *Camden's* Britannia, English edition, 1695, 557, 8, 9, the city of *Chester* is treated of as being within the county palatine, and is said to have been incorporated into a distinct county by king *Henry* the Seventh, and see stat. 43 *Eliz. c.* 15. *s.* 2. So in the *King* v. *Brereton*, 8 *Mod.* 328. it was held, that if an information be filed for a fact done in the county of the city, there shall be a *mittimus* to the chamberlain, commanding him that he send the record to the mayor of the city, who, after trial, sends it back, and it is remitted to the Court; and an exception being taken that it did not appear that the chamberlain of the county palatine of *Chester* was chamberlain of the city of *Chester*, it was answered, that the chamberlain of the county palatine is chamberlain of the city, for the city of *Chester*, being part of the county palatine, he has jurisdiction within the city by 33 *Hen.* 8. *c.* 13. 1 *Inst.* 211; and the Court said, that if the precedents were so they could not vary now, and that the city was part of the county palatine. Yet the city of *Chester* is a county of itself, distinct from the county palatine, stat. 43 *Eliz. c.* 15.; and see the forms of *posteas* in the city of *Chester*, and in the county palatine, *Tidd's* Forms, 4th ed. 364, 5.—A writ directed to an improper officer may be quashed on motion *quia improvide emanavit*, *Grant* v. *Bagge*, 3 *East*, 140. and in *Bowring* v. *Pritchard*, 14 *East*, 289. the Court granted a rule for discharging the defendant out of custody, where he had been arrested upon a *latitat* directed to the bailiff of the borough of *Southwark* instead of to the sheriff of *Surrey*. So the proceedings have been set aside, where a *capias* issued to the sheriff of *Kent*, and was served in the cinque ports. *Williams* v. *Gregg*, 7 *Taunt.* 233. 2 *Marsh.* Rep. 550. S. C.; and see *Letsom* v. *Bickley*, 5 *M. & S.* 144. But the Court will not discharge a defendant out of custody on the ground that he was arrested within the verge of the palace, or within a particular liberty. *Fitzpatrick* v. *Kelly*, cited 3 T. R. 740; *Bartlett* v. *Hebbes*, 5 T. R. 687; *Carrett* v. *Smallpage*, 9 *East*, 341, 2; *Sparks* v. *Spink*, 7 *Taunt.* 311; in which case the arrest is not void, but the person who makes the arrest is liable to answer to the owner of the franchise. But it is said, that killing the bailiff while attempting to execute a writ without a *non omittas* clause in an exclusive liberty, will not amount to murder. *Rex* v. *Meade*, 2 *Stark.* 205. 1 *Holt*, 593, S. C.

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command the sheriffs of the city of *Chester* and county of the same city to take the defendant, &c. He contended that this misdirection of the process was fatal, and might be taken advantage of by the defendant.(*a*)

Chitty now shewed cause, and submitted that as the city of *Chester* was made a county of itself by letters patent of *Henry* 7, it was not necessary, as in *Cheshire*, that the writ should be directed to the Chamberlain.(*b*) He also referred to the instructions as to direction of writs in *Impey's* K. B. 155, and *Tidd's* Forms, 4th ed. 68, (*c*) from which it may be collected, that the process should be directed "To our Sheriffs of our city of *Chester*." Secondly, he submitted, that even admitting that the sheriff might be liable to an action for the infringement of the franchise of the chamberlain, yet the defendant himself could not object, and referred to *Gilbert's* C. P. 27. where it is said, that if the sheriff enter a liberty and arrest the defendant without a *non omittas*, the arrest is good, though the sheriff may be liable to an action.(*d*) It was also prayed, that if the writ should be deemed irregular, the plaintiff should be permitted to amend, or the defendant enter an appearance, on payment of costs.

The COURT held the process clearly irregular, refused leave to amend, and made the

Rule absolute, with Costs.

(*a*) *Grant* v. *Bagge*, 3 *East*, 128. (*b*) *Imp.* K. B. 159, 160, 1.
(*c*) Stat. 43 *Eliz.* c. 15. *sec.* 2. *Camd. Brit.* ed. 1695. 559.
(*d*) *Imp.* K. B. 163. *Carratt* v. *Smallpage*, 9 *East*, 330.

Saturday, May 22d.

JONES *against* PERKS.

Where the venue has been changed by the defendant from *London* to *Staf-*

IN this case the *venue* was originally laid in *London*, and the defendant afterwards changed it to *Staffordshire*, on the usual affidavit that the cause of action arose

in *Staffordshire*, and not in *London* or elsewhere. On a former day a rule was obtained, calling on the defendant to shew cause why the *venue* should not be brought back to *London*, upon the plaintiff undertaking to give material evidence either in *Worcestershire* or *Staffordshire*, on an affidavit that the cause of action arose partly in one and partly in the other of those counties. The affidavit, however, did not state any facts shewing that the cause of action did arise in those counties.

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ford, on the usual affidavit, that the cause of action arose in *Stafford*, the Court will not bring back the *venue* to *London* on an affidavit that the cause of action arose partly in *Stafford* and partly in *Worcester*, and on an undertaking to give material evidence in one or other of those counties; especially if no special facts are stated to shew that the whole cause of action arose in one or other of the two counties. (*a*)

Reader now shewed cause against the rule, upon an affidavit, which swore positively that the cause of action arose wholly in *Staffordshire*, and not elsewhere. He contended, that the Court must be bound by this affidavit, and not by what was stated in the affidavit made by the plaintiff. It was the indisputable privilege of the defendant to change the *venue* upon an affidavit that the cause of action arose solely in the county to which he wished the *venue* to be changed. Such an affidavit had originally been made, and it was now

(*a*) In the case of *Price* v. *Woodburne*, 6 *East*, 433. it was held, that though the *venue* has been changed by the defendant upon a false affidavit, yet the plaintiff cannot bring it back to the county where it was first laid, even on an affidavit disclosing circumstances which prove the falsehood of the defendant's affidavit, without the usual undertaking to give material evidence in that county; and Lord *Ellenborough* said, the plaintiffs had brought the difficulty upon themselves by having laid their *venue* at first in a wrong county, where no part of the cause of action arose, which prevents them from giving the usual undertaking *always required*, to enable a plaintiff to bring back the *venue* after it has been changed; and such being the general rule, it is better to abide by it, otherwise we shall have to try every cause on a motion to change the *venue*, and there must be a rule to shew cause instead of a rule absolute in the first instance to change the *venue*. See also *Guard* v. *Hodge*, 10 *East*, 32. And the Court in such case will neither permit the *venue* to be brought back to the original county, nor will they change it to the county in which the cause of action did arise. *Massey* v. *Anderton*, *Tidd*, 6th ed. 642. But in C. P. an application to change the *venue* from A. to B. will be answered by an affidavit that the cause of action arose in C. and D., the plaintiff undertaking to give material evidence in one of those counties. *Neale* v. *Neville*, *Savory* v. *Spooner*, 6 *Taunt*. 565; *Powel* v. *Rich*, 7 *Taunt*. 178; *Hunt* v. *Bridgeford*, 1 *Taunt*. 259; *Collins* v. *Jacob*, 3 *Bos*. & *Pul*. 579; *Tidd*, 6th ed. 641.

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JONES *against* PERKS.

reiterated. The Court were, therefore, bound to abide by what was last sworn.

D. Jones, in support of the rule, insisted, on the authority of several cases, that the Court ought to comply with this application; the plaintiff's affidavit stating that the cause of action arose in the county of *Worcester* as well as the county of *Stafford*, and upon an undertaking to give material evidence in either of those counties. He referred to *Cailand* v. *Champion*, (a) *Hunt* v. *Bridgeford*, (b) *Neale* v. *Neville*, (c) *Powell* v. *Rich*. (d)

Reader observed, that the practice C. P. was different from that in this Court; for in the former the motion to change the *venue* was only a rule *nisi*, but here it was a rule *absolute* in the first instance.

ABBOTT C. J. This application is new, at least in this Court. The cases which have been cited in support of it are cases in which the plaintiff stated some special fact not denied on the other side. In all those cases the special facts were stated, but here no fact is specified: the parties only swear to the legal conclusion drawn from facts. The defendant originally changed the *venue* upon an affidavit framed according to the practice which has prevailed in this Court for a great many years. The plaintiff moved to bring the *venue* back upon an affidavit different in substance from any of the cases cited. In the case of *Cailland* v. *Champion*, (e) the defendant changed the *venue* to *London*

(a) 7 T. R. 205. (b) 1 *Taunt*. 259. (c) 6 *Taunt*. 565.

(d) 7 *Taunt*. 178; 2 *Marsh*. 494, S. C. differently reported.

(e) 7 T. R. 205; and this case seems qualified by that of *Price* v. *Woodburne*, 5 *East*, 433; and it appears from the report that part of the cause of action was stated in the plaintiff's affidavit to have arisen in a foreign country, as to which see 6 *Taunt*. 565, 569; 2 *Taunt*. 197; 2 New Rep. 397; 4 *East*. 195.

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on the usual affidavit that the cause of action arose wholly in *London*. After which a rule was obtained calling on the defendant to shew cause why the former rule for changing the *venue* to *London* should not be discharged, on the ground that the *venue* had been improperly removed to *London*; because the fact sworn to by the defendant could not possibly be true, namely, that the whole cause of action arose in *London*, the party whose life was insured having died in *Scotland*. Here there is no allegation of any distinct fact. The defendant says the whole cause of action arose in *Staffordshire*. The plaintiff says it did not wholly arise in that county, but it partly arose in *Worcestershire*. This is only swearing to the legal result of his opinion upon certain facts, which facts are not disclosed. Now if we were to allow an affidavit of this description to be a sufficient ground for bringing back the *venue*, we should have motions after motions of this kind, founded upon this general mode of swearing to legal results. Then lastly, we have the affidavit of the defendant swearing that the cause of action arose solely in the county of *Stafford*. Why are we not to take his affidavit to be true as well as that of the plaintiff? If the plaintiff's affidavit stated some special fact to shew that the defendant's affidavit could not be correct, then the cases cited might be authorities in support of this motion. But as the plaintiff does not so place himself before the Court, I think we ought not to interfere.

BAYLEY J. I am of the same opinion; and I think it would be unreasonable in this instance upon the affidavits produced to bring the *venue* back to *London*. The facts of the case arising either in *Worcestershire* or *Staffordshire* might be a very good reason for trying the cause in one or other of those counties; but it could be no reason for trying it in *London*, which is a great distance from both of those counties. The plaintiff seeks

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to bring the *venue* back to *London* upon an undertaking to give material evidence in *Worcestershire,* without condescending to state any special grounds for his motion. In the absence of such grounds, I think this does not fall within any of the cases decided.

HOLROYD J. There is no sufficient ground laid before the Court to make this rule absolute. This is very distinguishable from the case of *Cailland* v. *Champion,* (a) where particular facts were stated, shewing that what the defendant had said upon his affidavit could not be true, and which facts were admitted on the part of the defendant to be unanswered. It has always been the settled practice in this Court, that where the *venue* has been changed on the usual affidavit, it could not be brought back, except on the undertaking to give material evidence in the county to which the *venue* was changed, and upon a statement of facts shewing the necessity for such change. In the present case no facts are stated to induce the Court to bring the *venue* back, and therefore I am of opinion that the rule must be discharged.

BEST J. The case is distinguishable from *Cailland* v. *Champion,* and is quite distinct from the cases in the Common Pleas. In the cases in the Common Pleas the decision of the Court was governed by a special statements of facts disclosed on affidavit. In this case it is said that the cause of action arises partly in *Staffordshire* and partly in *Worcestershire.* That does not bring it within the rule laid down in the Common Pleas, because the action is not originally brought in either of the counties to which the *venue* is changed.

Rule discharged.

(a) 7 T. R. 205.

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Saturday, May 22d.

Court will grant leave to compound a penal action prosecuted by parish officers, where circumstances of mitigation appear; but leave cannot be obtained at *Nisi Prius*, the motion must be made to the Court in bank, and defendant must consent by counsel. (*a*)

MORGAN *q. t. against* LUTE.

THIS was an action to recover penalties against the defendant under a penal statute. At the trial before *Holroyd* J. on the last Western circuit, there appearing to be some circumstances of mitigation in

(*a*) By statute 18 *Eliz. c.* 5. *s.* 3. it is enacted, that no common informer or plaintiff shall or may compound or agree with any person or persons that shall offend or shall be surmised to offend against any penal statute, for such offence committed or pretended to be committed; but after answer made in Court unto the information or suit in that behalf exhibited or prosecuted, nor after answer, but by the *order or consent of the Court* in which the same information or suit shall be depending, upon the pains and penalties in that act set down and declared. And the 4th section enacts, That if any person or persons, except the clerks of the Court only for making out process, otherwise than is therein appointed, shall offend in suing out of process, making of composition or other misdemeanour contrary to the true intent and meaning of this statute; or shall by colour or pretence of process, or without process, upon colour or pretence of any matter of offence against any penal law, *make any composition*, or take any money, reward, or promise of reward for himself, or to the use of any other, without *order or consent of some of her Majesty's courts at Westminster*, that then he or they so offending being thereof lawfully convicted, shall stand on the pillory (now altered into fine or imprisonment at the discretion of the Court, 56 *Geo.* 3. *c.* 138), be disabled to sue on any penal statute, and forfeit ten pounds, half to the King and half to the party grieved. A Judge at *nisi prius* has no equitable jurisdiction, and can only look to the strict legal rights of the parties to the record. *Alner* v. *George*, 1 *Campb.* 392; *Dale* v. *Birch*, 3 *Campb.* 348; and therefore the application for leave to compound must be made to the Court. On such an application, even after verdict, where favourable circumstances appear, and the defendant consents by counsel, the Court will grant a rule absolute in the first instance, for leave to compound, *Maughan* qui tam, v. *Walker*, 5 T. R. 98. But after verdict, it seems that the defendant must shew that there are circumstances in the case which entitle him to the indulgence. *Crowder* v. *Wagstaff*, 1 *Bos.* & *Pul.* 18. And the Court of King's Bench, in the exercise of their discretion, have refused leave to compound in an action on the statute 25 *Geo.* 2. *c.* 36. for keeping a disorderly house. *Bellis* v. *Beale*, *Tidd*, 6th ed. 582. So in an action on the statute 13 *Geo.* 2. *c.* 19. where part of the penalty was given to the poor, the Court would not give the parties leave to compound, though the overseers at a vestry had agreed to compound without receiving any part of the penalty, because the churchwardens and overseers were trustees for the parish, and they could not give up the money. *Hanson* q. t. v. *Sprange*, 2 *Smith* Rep. 195. In C. P. where part of the penalty goes to the King, the consent of the crown must be obtained before a rule can be granted for leave to compound, either before or after verdict. *Howard* v. *Sowerby*, 1 *Taunt.* 103; *Sheldon* q. t. v. *Mumford*, 5 *Taunt.* 268.

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the defendant's conduct, the parish officers, at whose instance the action was brought, were willing to remit the whole penalty of 100*l.* except the sum of 20*l.*; but the learned Judge said that the action could only be compounded with the leave of the Court above; and

A. Moore now moved for leave to remit 80*l.* of the penalty given by the statute, and he cited *Maughan, q. t.* v. *Walker*, (*b*) where the Court gave leave to compound after verdict obtained in an action for usury.

The COURT said that this could not be done at the trial, and the proper mode was that now adopted; but it was necessary that the defendant should consent by counsel. Accordingly the defendant afterwards consented by counsel, and the rule was made absolute.

(*b*) 5 T. R. 98.

Saturday, May 22d.

KIRKHAM *against* MARTER.

Motion for a new trial of a cause tried in the Sittings in Term may be made within four days after the *return of the distringas*, and is not confined to the space of four days after the trial of the cause. (*a*)

THIS cause was tried on *Thursday*, 13th inst. being the second Sittings in this Term, when the plaintiff was nonsuited on a point of law. The *distringas* was

(*a*) The space of four days is the time prescribed by the rule for judgment; and in note (*a*) to Rule 3d, *East.* T. 5 *Geo.* 2. it is stated that no judgment given either for the plaintiff or defendant, upon a writ of *nisi prius* or inquiry, can be entered until four days (exclusive) after the entry of a rule for judgment, during which four days the party against whom the judgment is given may move for a new trial, and if it be denied, may then move in arrest of judgment, &c. but the rule for judgment is not necessary if the plaintiff be nonsuited, for in that case it is said judgment may be entered immediately after the day in bank, Rule *East. reg.* 3, note (*a*) K. B. In C. P. if a cause be tried in Term time, the motion for a new trial must be made before or on the appearance day of the return of the *habeas corpora juratum*, if returnable as in actions by original on a general return day; or if returnable on a day certain, then within four days exclusive of the return day, *Imp.* C. P. 434. *Tidd*, 6th ed. 931. A new trial cannot be moved for after the four days have expired, even with the consent of the parties. *Anon. Mich.* T. 1816, *Nov.* 13. The *Attorney General* moved, by consent of the parties, for a new trial after

New trial cannot be moved after the four days,

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KIRKHAM *against* MARTER.

returnable the 17th inst. being *Monday*, and on the 21st inst. *Abraham* moved for a new trial, but it was then suggested that the motion should have been made within four days after the trial, and he then took nothing by his motion. He mentioned the case again this day, and referred to a manuscript note of the case of *Goften* v. *Chissus* as in point, and in which *Gurney* was for the plaintiff, and *Chitty* for the defendant. There the trial took place at *Westminster Hall*, at the second Sittings in *Easter* Term 1818, being on *Monday* the 21st of *April*. A verdict was found for the plaintiff, the defendant's witnesses and attorney having gone away on the assurance of counsel that the cause could not come on that day. The *distringas* was returnable on *Wednesday* the 22d of *April*, and on *Saturday* the 25th, *Chitty* moved for a new trial, grounded on an affidavit of these facts, and obtained a rule *nisi*, which on *Saturday* the 3d of *May* following was made absolute, (although opposed on the ground that the motion ought to have been made within four days after the trial) the defendant consenting to pay the money into Court, pay the costs of the day, and the costs of the application to be taxed by the Master. On the authority of this case,

The COURT gave leave to make the motion, which was accordingly heard, but refused, upon the ground that the nonsuit was well founded.

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the first four days of the Term, but notwithstanding the consent, the *Court* said it could not be done, and the application being made after the time allowed by the practice of the Court, the rule for a new trial must be refused. So affidavit in support of rule for new trial sworn after the four days cannot be received.—*Rucker* v. *Marshal*. *Mich.* T. 1818. *Nov.* 13th. This cause was tried on depositions at the Sittings at Guildhall, before *Abbott* C. J. when the plaintiff was nonsuited. *Tindal* now moved to set aside the nonsuit and have a new trial. The motion was proposed to be made on an affidavit, but that affidavit was not in the counsel's possession till the morning of the previous day. The *Court* expressed an opinion that that affidavit could not be used, the affidavit not having been sworn within the first four days of the Term. But the Court upon other grounds granted a rule *nisi* on payment of costs.

though by the consent of the parties.

Affidavit in support of a motion for a new trial must be sworn within four days of the Term.

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Monday, May 24th.

Notice at the foot of a bill of *Middlesex*, specifying the day and month when the defendant is to appear, is regular, though it *wholly* omit to state the year, or the word "next." (*a*)

HUMPHRIES *against* CULLINGWOOD.

A. *MOSS* shewed cause against a rule *nisi* for setting aside the service of the copy of the bill of *Middlesex* in this case for irregularity; the irregularity complained of being the total omission in the notice to appear at the foot of the process as well of the year as of the word "next," which, (it was contended) were required by the statute 5 *G.* 2. *c.* 27. He submitted that

(*a*) By stat. 5 *Geo.* 2. *c.* 27. *s.* 1. it is enacted, that in all cases where the cause of action shall not amount to the sum of 10*l.* (since extended to 15*l.* except on bill or note, 51 *Geo.* 3. *c.* 124. *s.* 1.) the writ, process, declaration, and all other proceedings shall be in the *English* tongue, and written in words at length in a common legible hand and character; and *s.* 4. directs, that upon every copy of such process, to be served upon any defendant, shall be written *in like manner* an English notice to such defendant, of the intent and meaning of such service, to the effect following, viz. "*A. B.*, you are served with this process to the intent that you may, by your attorney, appear in his Majesty's Court of ——— at the return thereof, being the ——— day of ——— (as the case shall happen to be) in order to your defence in this action." It is observable, that this form does not require any *year* to be mentioned. And in the case of *Elliot* v. *Parrot*, *Barnes* 425, where the notice specified the day of the month at which the defendant was to appear, without saying instant, next, or mentioning the year; the Court held it to be sufficient, exploding the former doctrine upon the subject. See also the case of the *Weavers' Company* v. *Forrest*, 2 *Stra.* 1232. But it was afterwards held, that as the first section of the statute directed the proceedings to be written "in words at length," and the fourth section required the English notice upon the copy of the process to be written "in like manner," it was necessary that the *day of the month* should be specified in words at length. *Pinero* v. *Hudson*, 1 *M.* & *S.* 119; *Baylis* v. *Hall*, *Trin.* T. 1815, MSS. And it was at one time considered, that though it was unnecessary to specify the year, yet if the year was mentioned, and stated in figures instead of words at length, the service of the process was irregular.

Held, that the year in which the defendant is directed to appear, in a notice at the foot of common process, if stated at all must be in letters, not figures. But the doctrine is now overruled.

Stebbing v. *Hunt*. *Parke* shewed cause against a rule obtained by *Espinasse* to set aside proceedings for irregularity, on the ground that the year in which the defendant was directed to appear in the notice at the foot of common process was stated in *figures*, although the day of the month was written in words at length. It was contended, that this was an old printed form, and that there was no room to enter the year in words; that all the practitioners and officers were of opinion that the year had never been stated in letters, and that the practice must be admitted to explain the words of the statute; that the form had probably been settled long ago by the Court, and that the same information was afforded by figures as by letters, and many uninformed persons would be able to read figures who could not read the words at length. *Campbell*, *amicus curiæ*, observed, that in two cases it had been held not necessary to state the year at all. *Weavers' Company* v. *Forrest*, 2 *Stra.* 1232;

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HUMPHRIES *against* COLLINGWOOD.

the statute did not require any statement whatever of the *year* in the notice to appear, and that the word "next" was unnecessary, and he referred to the cases of the *Weavers' Company*, v. *Forrest*, (*b*) *Steel* v. *Campbell*, (*c*) and *Pinero* v. *Hudson*. (*d*)

Holt contended that it was necessary to insert the year, or at least the word "next," and referred to *Wingfield* v. *Beard*, *Barnes*, 419, and he urged that the modern decisions only established that the year might be stated in figures, but these determinations did not warrant the total omission of the year.

The COURT said that the object of the legislature in passing this act, was to give certain information to persons

Elliot v. *Parrot*, *Barnes* 425.—*Le Blanc* J. said, It is sufficient certainly if the word "next" or "instant" is introduced. It is the intention of the notice to explain the year of the reign mentioned in the writ. As to the argument, that many persons are acquainted with figures who could not read the words at length, that would extend equally to the day of the month, which must be stated in words.—*Dampier* J. said, "It is not material to mention the year; but the question is here, whether, if mentioned, you must not mention it correctly, and set it out in words at length. Can you strike out the year as surplusage? if not, it must be in letters." And the *Court* made the rule absolute for setting aside the proceeding, but, on the particular circumstances of the case, without costs. See also *Williams* v. *Jay*, cited 5 *Taunt*. 652; *Grojan* v. *Lee*, 5 *Taunt*. 651, 1 *Marsh*. 272, S. C.; *Dand* v. *Barnes*, 6 *Taunt*. 5, 1 *Marsh*, 405, S. C.; where it was held, that though the day of the month was stated in words at length, yet if the year was stated in figures the service was irregular; but these cases have been since overruled. *Butler* v. *Cohen*, 4. *M*. & *S*. 335; *Eyre* v. *Walsh*, 6 *Taunt*. 333, 1 *Marsh*. 577; and it is now held, that as it is unnecessary to state the year at all, the service of the process will not be irregular if the year is stated in figures.—*Baylis* v. *Hall*. *Trin*. T. 1815, *June* 8th. *Wilkinson* moved to set aside proceedings on account of the *year* in the *English* notice being expressed in figures instead of words at length. *Sed per Bayley* J. It has been settled that the year may be in figures, though the day of the month must be set forth in words at length. Therefore there is no irregularity, and the rule must be refused.

The year in the *English* notice may be in figures, though the day of the month must be set out in words.

See also *Anon*. *Mich*. T. 1815, *Nov*. 8th. *Barrow* moved to set aside the service of a *latitat*, on account of the year in which the defendant was directed to appear in the notice at the foot of the writ being in figures, and he relied on the case of *Grojan* v. *Lee*, 1 *Marsh*. 272. 5 *Taunt*. 651, S. C. *Sed per Curiam*. That question was settled the last Term: and on a conference with the Chief Justice of the Common Pleas, that case was in terms overruled, and finally decided that the year may be in figures.

The year in an *English* notice may be in figures.

(*b*) 2 *Str*. 1232, 1233. (*c*) 1 *Taunt*. 424. (*d*) 1 *M*. & *S*. 119.

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who might not know what was meant by *Monday* next after the morrow of *All Souls*, or any other Feast-day in the Term. It was necessary to give the day of the *month*, in order that ignorant persons might not be puzzled by the technical expressions of time usually adopted in the process of the Court; but neither upon the words of the act, nor upon principle, was there any necessity for stating the *year*, inasmuch as the party, by the statement of the day of the month when he was required to appear, must understand that he was required to appear at the earliest time to which the notice could apply. The Court also referred to the case of *Butler* v. *Cohen*, (*a*) in which it was held, that the year being in figures in the *English* notice, did not render the service of the process irregular, and the Court said that that decision took place after the Judges of this Court had conferred with those of the Common Pleas; and that the ground of the decision was, that inasmuch as it was not necessary to specify the year at all in the notice, consequently the statement of it in figures could not prejudice; and it was observed that the case of *Eyre* v. *Walsh*, (*b*) established that the practice of the Court of Common Pleas was to the same effect.

Rule discharged.

(*a*) 4 *M.* & *S.* 335. (*b*) 6 *Taunt.* 333.

Monday *May* 24th.

WILLIAMS *against* SCUDAMORE.

Where a defendant in custody of the marshal pleads to a declaration filed *de bene esse*, he is not entitled to his discharge under the Rule of Court 5 *W.* & *M.* although no declaration in chief is afterwards delivered within two Terms. In such case no affidavit need be filed of the delivery of the declaration. (*a*)

THE defendant in this case was arrested on a *testatum capias* returnable the first return of *Michaelmas* Term last, and notice of declaration was served *de bene*

(*a*) Where a declaration was delivered to a prisoner in custody in the gaol at Exeter, indorsed with a notice to plead in eight days, and the defendant pleaded before the declaration was filed, it was held that the plaintiff could not sign judgment as for want of a plea. *Fraus* v. *Paravicini*, 4 *Taunt.* 545. By Rule *Hil.* 26 *Geo.* 3. it is ordered, that in all cases where a pri-

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esse on the 9th *November*, and on the 10th notice of render was served on the plaintiff's agent, and on the 17th of the same month the defendant, being a prisoner, pleaded the general issue; upon which issue was joined, and the case was tried at the Sittings after last *Hilary* Term. Since that time he remained in the custody of the marshal, and no declaration in chief had been delivered by the plaintiff. A summons having been taken out by the defendant before BAYLEY J. at chambers, on the ground that he was supersedeable, and entitled to his discharge under the rule of Court *E.* 5 *W.* & *M.* (*a*) no declaration having been delivered within two Terms, an order was granted. The order made upon the rule now came before the Court, and the question was, whether the defendant was supersedeable under the circumstances above stated, on the ground that no declaration had been delivered within the time prescribed by the Court.

Carter, for the plaintiff, contended that the defendant, by pleading to the declaration filed *de bene esse*, waived the irregularity (if any) in not delivering the declaration in chief, and was consequently not entitled to his *supersedeas*. Strictly speaking, perhaps the declaration should have been delivered to him after he had been rendered by his bail, but as he chose, of his own accord, to plead to the declaration filed *de bene esse*, he waived the irregularity. He referred to *Pearson* v. *Rawlings*, (*b*) where it was held that a prisoner, who is super-

soner is or shall be taken, detained, or charged in custody by *mesne* process issuing out of this Court, and the plaintiff shall not cause a declaration against such prisoner to be *delivered* to such prisoner, or to the gaoler or turnkey of the gaol or prison where such prisoner is or shall be detained or charged in custody, before the end of the next Term after the return of the process by virtue whereof such prisoner is or shall be taken, detained, or charged in custody; and (unless the prisoner is or shall be in custody of the marshal) cause an affidavit to be made and filed with the clerk of the rules of this Court, of the delivery of such declaration, and of the time when, and the person to whom the same was delivered, before the first day of the next Term after the delivery of such declaration, the prisoner shall be discharged out of custody by writ of *supersedeas*.

(*a*) Reg. 3. note *b*. (*b*) 1 *East*, 77.

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sedeable for want of filing a bill against him in time, waives the irregularity by afterwards pleading. In this case the defendant pleaded after he was in custody, and he thereby encouraged the plaintiff to go on, without complying with the strict rule of the Court. It was too late for him, therefore, to avail himself of an objection with which he had previously dispensed. If nothing had been done on his part until the declaration was delivered, then he might avail himself of the irregularity; but having taken a step in pleading to a declaration filed *de bene esse,* it was plainly telling the plaintiff that he need not deliver a declaration.

Chitty contrà, contended that the defendant in this case was entitled to a *supersedeas,* as well upon the authority of the rule of Court of 5 *W.* & *M.* as of decided cases. It was clear, that by the rule of Court referred to, if there be no declaration delivered against a prisoner within two Terms, he is entitled to be discharged; and by the rule *Trin.* 19 *G.* 3. a prisoner supersedeable is deprived of the prison allowance, and he shall be turned out of prison. [ABBOTT C. J. The question here is, whether the defendant is in fact supersedeable?] By the rule of 5 *W.* & *M.* there must be an affidavit filed of the delivery of the declaration. [BAYLEY J. Can the defendant complain that no declaration has been delivered, after he has actually pleaded? —BEST J. He acknowledges the fact.] The general rule is, that where a declaration is delivered *de bene esse,* and the defendant is afterwards rendered, there must be a declaration delivered. Here the declaration is filed *de bene esse,* and the defendant being in custody, he has no opportunity of searching the file, having no attorney either to direct him what to do, or to take the declaration out of the office. The plaintiff demands a plea, and the defendant, ignorant of his own interests, complies with the rule. The object of the rule 5 *W.* & *M.* is to prevent a prisoner who has not the ad-

vantage of the advice of an attorney, from being drawn in to plead imprudently. The defendant here had pleaded sooner than he need have done, and therefore he was entitled to the benefit of the rule. It was a positive direction of the rule, that the declaration should be delivered personally to the defendant, in order that he might clearly understand what he had to plead to. The circumstance of the defendant having pleaded was no waiver of the irregularity, so as to deprive him of the benefit of the *supersedeas*, because he might avail himself of it at any time before judgment; for, according to an old rule of practice, where a party is once supersedeable, he is always so. (*a*) He submitted, therefore, that the plaintiff should have delivered a declaration in chief after the defendant was in custody, and that the latter was not concluded by his plea; and he cited *Nowell* v. *Bingham*, (*b*) where it was held, that the delivery of a declaration against a prisoner, though within two Terms, is a nullity, if there were no bill filed before, and he is entitled to his discharge under the rule 5 *W.* & *M.*

ABBOTT C. J. There is no doubt respecting the general rule. The single question is, whether the defendant, having pleaded to the declaration filed, has not thereby led the plaintiff to suppose that it was a good declaration, to which he found himself bound to answer. I think the defendant by so doing was not supersedeable, and consequently the reasoning built upon the assumption of the fact, that he was, does not apply.

BAYLEY J. I think the defendant cannot complain that a declaration has not been delivered, after he has pleaded to a declaration filed. He was in the custody of the marshal, and he was not bound to plead, but

(*a*) *Rose* v. *Christfield*, 1 T. R. 591. (*b*) 4 *East*. 16.

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having pleaded, he waives the irregularity. The ground upon which he is sought to be discharged is, that the plaintiff did not declare in due time, but that objection is answered by the defendant's own conduct. It is also said that no affidavit has been filed of the delivery of the declaration: but where a defendant is in custody of the marshal, no affidavit is ever filed. (*a*)

The rest of the Court concurred, and the order for the prisoner's release was discharged.

(*a*) *Tidd*, 6th ed. 352. See terms of the rule, ante, 388, note.

Monday May 24th.

MOUNTSTEPHEN *and* OTHERS *against* BROOKE *and* OTHERS.

Plea *puis darrein* continuance of release by one of several plaintiffs set aside without costs, on terms of indemnity against costs being given to the plaintiff who had released the action, though the consent of such plaintiff had not been obtained before action brought, it appearing that no consideration had been given for the release, and that the plaintiffs sued as trustees for the creditors of an insolvent person. (*a*)

THIS was an action of *assumpsit* on four bills of exchange drawn by *Humphry Mills* upon and accepted by the defendants, and payable to the plaintiffs'

(*a*) In the case of *Doe* v. *Franklin*, 7 *Taunt.* 9, where a landlord defrayed the costs of defending an action of ejectment in the name of an illiterate tenant, who afterwards gave a *retraxit* of the plea and confession of the action, the Court set aside the *retraxit* and *cognovit*, and let in the landlord to defend the action. So where a broker had made a distress for rent, and the landlord with the permission of the broker commenced an action in his name against the sheriff for taking insufficient pledges; but the bailiff afterwards gave notice to the landlord that the action should not proceed, which he alleged was done for the purpose of giving time to the sheriff's officer, who was much distressed, and the bailiff without the permission of the lessor released the action, the Court set aside the release and plea thereof *puis darrein* continuance; and *Burrough* J. observed, that in a similar case about ten years before, Lord *Eldon* C. J. had holden, that no action could be brought in the name of a trustee without his consent, but that if a trustee would not consent to lend his name as a plaintiff, the Court of Chancery would, on application, compel him to permit his name to be used; nevertheless that if an action were once commenced in the name of a trustee, he could not afterwards release it except by leave of the Court. The Court held that if the present action had been commenced without the plaintiff's permission, the release might have been a trick, the fruits of which the Court might possibly not have the right to take

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order; and at the trial at Guildhall, 8 *January* last, the defendants pleaded *puis darrein continuance* a release, dated 19th of *December* last, executed by the said *Humphry Mills*, who was one of the plaintiffs.

Marryat and *Chitty* on a former day moved for a rule to shew cause why this plea of release should not be discharged, and why the defendant should not pay the costs of the application, upon affidavits stating that the plaintiffs sued as trustees for the creditors of *Thomas Pook*, and that the plaintiff *Mills* had received no consideration for the release, and that the same was executed under circumstances sufficient to establish that the release was obtained with a fraudulent intent to defeat the action; and in support of the application, the case of *Legh* v. *Legh* (*a*) was referred to, in which it was held, that if the obligor of a bond after notice of its having been assigned take a release from the obligee and plead it to an action brought by the assignee in the name of the obligee, the Court will not set such a plea aside, and a rule *nisi* was obtained.

Gurney and *Gaselee* now shewed cause upon affidavits, which stated that the consent of *Mills* for the

from the defendant; but here the plaintiff had lent his name in the beginning, and the sheriff ought not to be permitted to arm himself with this release, *Hickey* v. *Burt*, 7 *Taunt.* 48. But where an action was brought by two plaintiffs as executors, to recover from the defendant money belonging to the testator's estate, the Court of Common Pleas refused to set aside a plea of release given by one of the plaintiffs, on a suggestion that the other plaintiff was the party beneficially interested; saying that where a co-plaintiff is by law competent to give a release, and the Court are called upon to set it aside upon the ground of fraud, the plaintiff applying must make out a very strong case of fraud, *Jones* v. *Herbert*, 7 *Taunt.* 421. Such a release must prevail at the trial, as the Judge at *Nisi Prius* has no equitable jurisdiction, and can only look to the legal rights of the parties, *Alner* v. *George*, 1 *Campb.* 392. It seems lawful for one of two joint creditors to arrest the debtor without the consent of the other creditor, 1 Lord *Raym.* 380; though a commission of bankruptcy can only be sued out upon the petition of both the creditors, *Buckland* v. *Newsame*, 1 *Taunt.* 477. 1 *Campb.* 474.

(*a*) 1 *Bos.* & *Pul.* 447.

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proceeding in the action had not been obtained, and that he verily believed that there was great risk in the action, that great costs had been incurred, and before he executed a release, he had given notice to the other plaintiffs and their attorneys, that unless he was indemnified against the costs, he would execute a release; and that not having received any answer, and finding that the cause was about to be tried, he had executed the release in order to protect himself from liability to further costs.

The COURT having inquired whether *Mills* owed any debt to the defendants, or had received any consideration for the release, it was admitted that no consideration had passed. Whereupon the Court ordered that the plea of release should be set aside and the release cancelled, the other plaintiffs undertaking to indemnify the plaintiff *Mills;* and the rule was made absolute on these terms without costs.

Monday, May 24th.

POWELL *against* HENDERSON.

Where a defendant was twice arrested, and put in bail to two writs in different counties for the same cause of action, the Court refused to make a rule absolute for setting aside proceedings in "one of two actions" brought against the defendant, as the proper course was, that an *exoneretur* should be entered on one of the bail-pieces. (*a*)

HOLT on a former day obtained a rule, calling upon the plaintiff to shew cause why one of two writs issued against the defendant should not be set aside for irregularity, with costs to be taxed by the master, the irregularity being, that the defendant was arrested twice for the same cause of action. The affidavit on

(*a*) Where a plaintiff sued out writs into two counties, and arrested the defendant in both, and two bail-bonds were given, and the defendant was then apprized that no further proceedings would be taken on the second writ, the Court refused to set aside the assignment of the first bail-bond, but said that it would be right that the proceedings on such second writ should be set aside, and that the plaintiff should pay the costs of these proceedings up to the time when he gave notice that he should not proceed in the second county. *Bullock* v. *Morris*, 2 *Taunt.* 67.

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which the motion was made, stated that the defendant was arrested on the 9th of *April*, in the county of *Surrey*, upon a *latitat*, and in ten days afterwards he was arrested again in *London* upon another *latitat* for the same cause of action, at the suit of the same plaintiff; and that the plaintiff's attorney suffered him to put in bail to both writs.

Park now shewed cause, and contended that the rule drawn up was not adapted to the circumstances of the case, for although two arrests had taken place under a mistake, there was in fact but one action, so that the Court could not make the rule absolute in the terms prayed. The proper application should have been to enter an *exoneretur* on one of the bail-pieces. He therefore submitted that this rule ought to be discharged, the plaintiff undertaking to enter an *exoneretur* on one of the bail-pieces, and the defendant undertaking not to bring any action. The plaintiff refusing to accept this offer,

The COURT discharged the rule with costs.

THE KING *against* THE SHERIFF OF MIDDLESEX, *in the cause of* BORWICK *against* WALTON.

Monday May 24th.

Where on return of *cepi corpus* the plaintiff brought an action against the sheriff for escape, and recovered damages: Held, that he could not afterwards rule the sheriff to bring in the body with a view to proceed in the original action for costs. (*a*)

HOLT on a former day obtained a rule to shew cause why the rule to bring in the body, which had been served on the sheriff of *Middlesex*, should not be set

(*a*) Upon the return of *cepi corpus*, if bail above be not duly put in and perfected, the plaintiff may either take an assignment of the bail-bond and proceed thereon against the defendant and his bail to the sheriff;—or he may proceed against the sheriff, by ruling him to bring in the body, *Tidd*, 6th ed. 287, 300. On the expiration of the rule to bring in the body, if the defendant be not brought into Court, or if bail above be not put in and perfected, the sheriff will be liable to an attachment, Rule *Mich.* 6 *Geo.* 2, note (*a*). But it is a general rule, that where a party has two remedies—by action and by

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aside, and why the plaintiff should not pay the costs of the application. The affidavit on which the rule was obtained, stated that the defendant had been arrested, and held to bail by process returnable the first return of last *Michaelmas* Term, for 200*l.*; that the sheriff returned *cepi corpus*; but that bail not having been put in in time, an action was brought against the sheriff for an escape, in which the plaintiff had recovered a verdict for 200*l.* which sum, together with the costs, had been paid; that afterwards a rule had been obtained against the sheriff, calling upon him to bring in the body, and to discharge that rule the present application was made.

Espinasse now shewed cause on an affidavit, stating, in addition to the facts above mentioned, that the ground of the action for an escape was, that the sheriff had not taken a bail-bond; that there appeared to have been great misconduct on the part of the officer; that the debt amounted to 200*l.* due on a bill of exchange; that there was an arrear of interest, which, with the costs up to the time of bringing the action, amounted to more than 20*l.* It was contended, that what had taken place in the action for the escape, could not legally amount to an exoneration of the sheriff from the liability which he had incurred by the return of *cepi corpus*; in consequence of which it became his duty to

attachment, as for non-performance of an award, &c. and the party elects to proceed by action, he cannot afterwards apply for an attachment. *Badley* v. *Loveday*, 1 *Bos. & Pul.* 81, (overruling 1 *Salk.* 73.) *Benn* v. *Denn*, *Barnes*, 180. So after suing out an attachment against the *sheriff*, the plaintiff cannot afterwards, whilst the attachment remains in force, take an assignment of the bail-bond, in order to proceed thereon against the defendant or his bail, *Cunningham* v. *Chambers*, *Tidd*, 6th ed. 287. It seems equally necessary that the plaintiff should not be allowed to rule the sheriff to bring in the body after he has recovered damages in an action for escape, because the sheriff would have a right to proceed against the defendant and his bail on the bail-bond, in order to indemnify himself against those damages. It has been held that the plaintiff cannot proceed in the original action after he has taken an assignment of the bail-bond, and while he retains his right to sue upon it, *Collett* v. *Bland*, 4 *Taunt.* 715. *Pigott* v. *Truste*, 3 *Bos. & Pul.* 221. *Tidd*, 291.

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put in bail above for the defendant. To give this effect to the verdict recovered against the sheriff, would be to make the sum recovered against the sheriff for damages operate as a set-off against the plaintiff's demand, of which there was no instance ever heard. The verdict had no reference whatever to the original action; it was in the nature of a punishment, in damages for the neglect of duty of the sheriff's officer. Although, in this instance, the whole debt had been recovered, the principle to be established by the decision on this rule was general; and if the plaintiff had recovered only what was usually given as damages in such an action, namely, one shilling, was that to operate to exonerate the sheriff, and defeat the plaintiff's original action? That this would be the effect of making the present rule absolute was obvious; and not only that, but it would subject the plaintiff to the loss of all his costs, and of the payment of costs to the defendant, for he must discontinue his action, as, unless the sheriff was bound to perfect bail, the plaintiff could not proceed in the original action. He had no other means of compelling the defendant to appear, for he could not file common bail according to the statute, and no attorney had appeared, nor had bail above been put in. The consequence of which was, that the plaintiff must either rest satisfied with his verdict, and lose his interest and costs, or discontinue on payment of costs, and begin *de novo*. (*a*)

Holt contrà, said that a more extraordinary application had never been made to the Court, than that of calling upon the sheriff to bring in the body after an action had previously been brought against him for the escape of the defendant, and damages recovered therein. The plaintiff had the option of either proceeding against

(*a*) But see the cases in *Com. Dig.* tit. Escape, which shew that in case of an escape, although an action has been brought against the sheriff, still the plaintiff may proceed by fresh or renewed process against the original defendant.

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the original defendant, or of bringing an action of escape against the sheriff. He thought proper to adopt the latter course of proceeding, and he had recovered the whole debt against the sheriff, who had actually paid the money. It was not competent for the plaintiff, therefore, eight months afterwards, to call upon the sheriff to bring in the body, because he had previously returned *cepi corpus*, the validity of which return was tried in the action for the escape. He was then stopped by the Court.

ABBOTT C. J. The plaintiff having recovered damages for an escape, can we compel the sheriff to bring in the body? Has not the plaintiff made his election by bringing an action for the escape? The plaintiff has sued the sheriff for the escape, saying that the return was false. When the sheriff made his return, the plaintiff had his choice of two modes of proceeding. He might have ruled the sheriff to bring in the body, or he might bring an action against the sheriff on the ground that the return was false. He has selected the latter course, and having done so, and recovered damages, can he now pursue the sheriff again for the same cause of complaint? I think he cannot.

HOLROYD J. I know of no authority which says that after a plaintiff has recovered damages in an action against the sheriff for having made a false return, in saying that he had the party in his custody, he may treat it as a true return, and compel him to bring in the body, when by the very action brought against him he shews that he has it not, and recovers a compensation for the escape. The circumstances urged in favour of this proceeding were such as might have been laid before the jury in the action for the escape, and they would have taken them into consideration in the question of damages. The plaintiff cannot be allowed

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to pursue both remedies; he cannot allege the falsehood of the return in the action for the escape, and then affirm its truth by calling upon the sheriff to bring in the body. The plaintiff cannot have two remedies for the same cause. To call upon the sheriff now to bring in the body, because he formerly returned *cepi corpus*, would be inconsistent with the action for the false return. It may be true, that in an action for a false return the plaintiff may recover only nominal damages, and there may be cases in which the party originally proceeded against may, upon being further pressed, pay the whole of the amount of the damages which the plaintiff has sustained; (*a*) but whether in such case the plaintiff may proceed against the party is a very different thing from proceeding against the sheriff in a mode which is inconsistent with the action for a false return. It appears to me therefore that the rule which has been obtained for bringing in the body must be discharged.

BEST J. The plaintiff has got all he can against the sheriff, and all I think he is entitled to get, and if we were to grant this application, I think we should be establishing a very dangerous precedent, because it would go to this extent—that a party might get his debt from the sheriff and afterwards proceed against the defendant in the action for the costs.

Rule absolute, with costs.

(*a*) See *ante*, 395, note (*a*).

TOMLIN *against* PRESTON *and* GILL.

Monday, May 24th.

Where the christian name of the defendant is omitted in a writ of *latitat*, the proceedings are ri-

PARK on a former day obtained a rule calling on the plaintiff to shew cause why the *latitat* should not be set aside, and all proceedings, so far as related to the defendant *Gill*, stayed, on the ground of irregu-

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larity; the irregularity being that the christian name of *Gill* was omitted in the writ.

Turton now shewed cause, and submitted that this being merely serviceable process, the same strictness was not required as in bailable process. He contended

regular, and will be set aside on motion, and there is no distinction between bailable and serviceable process; but where the rule *nisi* was moved for without costs, and defendant received the writ without objection, the Court made the rule absolute without costs. (*a*)

Bill of *Middlesex*, and notice thereto, describing the defendant as Mr. A. without stating his christian name, irregular.

(*a*) See also ——— v. *Snow*, *East.* T. 1817, *May* 2d.—*Heath* moved for a rule, calling upon the defendant to shew cause why the bill of *Middlesex*, and proceedings thereon, should not be set aside for irregularity; on the ground that the defendant was described in the process, and notice subscribed thereto, as Mr. *Snow*, without any christian name being inserted. Rule granted.—But the Court of Common Pleas have refused to set aside the proceedings, and order the bail-bond to be delivered up to be cancelled, because a defendant has been arrested upon a special *capias*, in which, as well as in the affidavit to hold to bail, the initials only of his christian name were inserted; observing, that the defendant had not been arrested by a wrong name, and that the objection was immaterial. *Howell* v. *Coleman*, 2 *Bos.* & *Pul.* 466. It does not appear from the report, that the defendant in this case had used the name in any previous dealings with the plaintiff. See *Walker* v. *Willoughby*, 6 *Taunt.* 530. The misnomer of one of the defendants may be cured by altering the name and then getting the writ resealed, after which it will be good against all.

Process, with names of four defendants, one of them being misnamed, may be served upon the three whose names are right; and if the name of the other be afterwards altered, and the writ resealed, it is good against all.

Anon. Mich. T. 1814, *Nov.* 18.—*Reader* moved to set aside process for irregularity. It appeared from the affidavits that a *latitat* had been issued against *Robert Tucker* and three other defendants; and it was served on the three defendants, but it was then found that *Tucker's* name was *William*, and not *Robert*; in consequence of which the writ was altered in the name, and then resealed.—On shewing cause, it was insisted that the writ was never perfect either against the three defendants in the first instance, or against the other defendants afterwards. But *Bayley* J. said, the writ was good against the three defendants on whom it was served in the first instance, and that the name of the other defendant, *Tucker*, might be treated as *John Doe*. Originally the process was bad against *Tucker* on account of the misnomer; but when altered and resealed it was good against *William Tucker*. The objection was accordingly overruled.—With respect to the costs of setting aside proceedings for irregularity, it is laid down, that if a rule *nisi* be granted for setting aside proceedings for irregularity, without saying with costs, and this rule be afterwards made absolute, no cause being shewn, it must be made absolute in the terms in which it is moved, without adding costs. Per cur. *Hil.* 37 *Geo.* 3. K. B. *Tidd*, 6th ed. 528. But it is a general rule that the irregular party is liable to the payment of costs.

It is a general rule that costs are allowed for irregularity, but

Anon. East. T. 1814, *May* 5th.—*Adolphus* shewed cause against a rule to set aside proceedings for irregularity. The rule was made absolute; but it was suggested, that this was not a case in which the rule would be made

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however that the irregularity was waived, it appearing by his affidavit that when *Gill* was served on the 5th instant with the process, he received it without any objection, saying to the attorney's clerk, "I suppose you are come to serve me with a writ."

Park, contrá, was stopped by the Court.

ABBOTT C. J. There is no difference between serviceable and bailable process upon questions of regularity. The Court invariably requires that its process shall be conducted with regularity and propriety, and the Christian names of the parties must be inserted

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absolute with costs.—*Dampier* J. said, The proceedings are set aside for irregularity; and if we once make an exception, every case for the future will depend upon its equitable circumstances. Rule absolute, with costs.—So also *Anon. Trin.* T. 1814, *June* 27. *Richardson* shewed cause against a rule obtained by *Comyn*, to set aside proceedings for a defect in the English notice at the foot of a writ. *Richardson* contended that the proceedings should not be set aside with costs, and referred to the case of *Stebbing* v. *Hunt*, ante, 385, note; where the Court, upon a motion to set aside the service of process on the ground of a defect in the English notice, considered the words of the act, and it was discussed at much length, and no costs were given—*Sed per* Lord *Ellenborough*, Ch. J. Under the particular circumstances of that case, we did not think it necessary to give costs, but it is the general course.—*Bayley* J. assented; and *Dampier* J. said, that the Master certified that this was always held an irregularity, and came within the general rule as to proceedings set aside for irregularity, and must be with costs. Rule absolute, with costs.—Where the rule for setting aside the proceedings is discharged, the practice is, that if the rule *nisi* was moved with costs, and the affidavits are expressly contradicted, the rule must be discharged with costs. *Tilley* v. *Henley*, ante, 136. But where a rule is not moved with costs, and nothing is said about costs at the time of discharging it, costs are not payable to the successful party.

Under very particular circumstances the Court will make the rule absolute without costs.

Anon. Hil. T. 1817, *Jan.* 29th.—The *Attorney General* moved for a rule to shew cause why the Master should not review his taxation of costs, and allow to a party the costs of a rule which had been discharged, nothing being said about the costs at the time of discharging it.—*Sed per Curiam.* The practice is, that if a rule is discharged, and nothing is said about costs, the rule is treated as if it had never existed. It is like a suit that has been terminated on a plea in abatement; and though it is true that the party has sustained some inconvenience in being brought before the Court, yet if the Court do not think proper to advert to that circumstance, and discharge the rule without expressly awarding costs, no costs can be obtained by the person on whom the rule was made. Rule refused accordingly.

Where a rule is discharged, and nothing is said about costs, the party shewing cause is not entitled to costs.

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even in a serviceable writ. The rule therefore in this case must be made absolute.

Turton prayed that it might be absolute without costs, the rule having been moved without costs, and the defendant having, it was contended, waived the irregularity: and

The COURT, under these circumstances, made the Rule absolute, without costs.

Monday, May 24th.

OSBORNE *against* TAYLOR.

A bill of *Middlesex* returnable "on *Thursday* next after *Easter* day," which was the day of the *Ascension*, is irregular, and the objection cannot be waived by defendant; but where defendant had promised to take no advantage, the Court set aside the proceedings without costs, and on the terms of no action being brought. (*a*)

ABRAHAM on a former day obtained a rule to shew cause why the bill of *Middlesex*, and all subsequent proceedings in this case, should not be set aside for irregularity; the irregularity being, that the bill of *Middlesex* was returnable "*on Thursday next after Easter-day,*" *Thursday* being a *dies non*, the affidavit stating that the defendant was arrested on the *Ascension-day*, and had given bail to the sheriff.

E. Lawes now shewed cause, and said that he could not resist the rule, so far as the stay of proceedings went, but prayed that the rule might not be made absolute with costs, upon an affidavit stating that the day before the rule was moved for, the defendant told the plaintiff's attorney that he should not take any advantage of the irregularity.

The COURT, upon this suggestion, made the rule

(*a*) *Ascension* day is *dies non juridicus*, and process must not be made returnable on that day, 2 *Inst.* 264, 5; and so of the feast of the *Purification* in *Hilary* Term, or *Midsummer* day, if it happen in *Trinity* Term, unless it be on the *Friday* next after *Trinity Sunday*, in which case it is *dies juridicus*, by the stat. 32 *Hen.* 8. *c.* 21. *Tidd*, 6th ed. 156. Such a defect cannot be waived by the defendant. *Taylor* v. *Phillips*, 3 *East*, 155.

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absolute, without costs, and on the terms that the defendant should not bring any action against the sheriff or the plaintiff.

Rule absolute accordingly.

The KING *against* MOZELY WOOLF, JOHN KINNEAR, LEWIS LEVY, *and* OTHERS.

Friday, April 30th. (*a*)

The dispersion of the jury with the permission of the Judge during the interval of an adjournment in case of a misdemeanour does not vitiate their verdict, where there is no suggestion of their having been improperly practised upon in the interim.

Whether the jury shall or shall not be permitted to separate before verdict, in cases of misdemeanour, is matter of discretion with the Judge. (*b*)

THESE defendants, sixteen in number, were indicted for a conspiracy to obtain goods by undue means; and the indictment charged "that they did unlawfully

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(*a*) As this case came before the Court at different times in the Term, it has been thought advisable to insert it in this part of the Report.

(*b*) Vide the Year Book, *Trin.* T. 14 *Hen.* 7. fol. 29. In the Exchequer Chamber, before all the Judges of the one Bench and the other, it was rehearsed that at *nisi prius*, in the county of *B.*, upon an issue between the bishop of *N.* and the earl of *Kent*, the jurors were chosen, tried, and sworn; and whilst the parties were giving their evidence, there came such a storm of thunder and rain that some of the jury departed without leave of the Justices (it seems they stood open in the street, *Bro. Abr.* Verdict, pl. 19); and one of the jurymen went into a house, where he met with persons who told him to take care what he did, for the matter was better for the earl of *Kent* than for the bishop; and prayed him to drink with them; and so he did; and after the storm was over, the jurors returned, and no challenge was taken to them. They were sent into an inn, and when they were agreed as to the verdict they were to deliver, the earl of *Kent* shewed all this matter to the Justices; and the jury, on being questioned by the Justices, confessed it all. Being then asked if they were agreed in their verdict, they said Yes, and found for the bishop; and the Justices were in doubt if the verdict was good or not, and consequently they adjourned.—*Wood*, Justice, now rehearsed all this matter, and it seemed to him that the verdict should be taken; and although the jurors had no leave to depart, but did it of their own heads, that is only a ground why they should be punished by fine, as appears best to the Justices, *Vavisor* J. (in *Bro. Abr.* tit. Verdict, pl. 19.—*Banister* J.) contrà. When a jury is charged, they are, as it were, prisoners until they are discharged, and cannot depart without the licence of the Justices; and if they had been put in a house and under guard, and had departed without licence, and then three or four days afterwards they had returned and given their verdict, that would have been void; then here they departed without licence, and although no evidence was given, that is not material in my view of the case.—*Rede* J. was

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and wickedly conspire, combine, confederate, and agree together, that *John Meyer* and *Henry Weiller* respectively, and also *Joseph Leigh*, and one *Thomas Reeve*,

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of opinion that the verdict was good: he agreed that the jurors are charged that they cannot depart without licence; but yet there may be some cases where their departure shall be excused, even without licence. As if an affray happens suddenly before the Justices, and they depart to preserve the peace, their departure is lawful; and so, if they are in a house, and the house fall, they may depart to save their lives. And here, in my opinion, they had a good cause for departing, that is to say, the tempest; therefore their departure is good and excusable.—*Davers* J. of the same opinion. The departure is no ground to make the verdict void; for this misdemeanour of the jurors the Justices cannot annul their verdict;—they may adjudge a fine upon them, or imprison them, or impose any other punishment of the like nature according to their discretion; but this is no cause to avoid the verdict.—*Tremaile* J. of the same opinion. First, they had a reasonable ground of departing on account of the tempest, and for reasonable cause, as has been said, they may depart well enough.—*Hody*, Chief Baron, and *Brian*, were of opinion that the verdict was void; the latter said, It is reasonable that they should be allowed to depart when they have cause, as in the case of a house falling, &c. but the rain was a feeble cause for the departure; wherefore their going, and all their misdemeanour was without cause; wherefore it seems to me that they shall be fined, and also their verdict shall be void.—*Fineux* J. was of opinion, that the departure was no ground for avoiding the verdict. The case was adjourned, and came on again in *Hilary* Term, 15 *Hen.* 7, fol. 1; when *Keble* said, It seems to me that they may well depart for a reasonable cause, notwithstanding the prohibition, and no punishment shall follow. It is commanded by the statute that none shall commit waste, and yet the sudden coming of a tempest shall be an excuse for the happening of waste. The same law is of breaking prison, but if the prison be on fire, a departure is no breach of the law. This case is cited in *Bro. Abr.* Verdict, pl. 19; where it is said, that the better opinion is, that the verdict in this case was good, notwithstanding the departure. In *Bro. Abr.* tit. Jurors, pl. 13, it is said, that the jurors may separate by reason of a great tempest or affray, or the falling of a house, and the same law is of a fire in the house. See also *Kelyng's* Rep. 2d edit. 56. The Lord *Dacre's* case, who was indicted for treason before commissioners of oyer and terminer in the county of *Cumberland*, for adhering to the *Scots*, the king's enemies, and tried by his peers 26th *Hen.* 8, the Duke of *Norfolk* being high steward; and the day before the trial all the Judges assembled to resolve certain questions which might arise upon the said trial, so that if any question should be asked them, they might resolve *una voce*.—And a question was moved among them, that if the Peers *did not agree*, so that the Court was adjourned till the next day, what should be done with the Peers, who were the tryers? And some Judges held they were to be kept together all night, but others held because they were not sworn, for the great trust reposed in them and presumed to be in them, they might go to their own houses every one by himself. In 2 *Lilly's* Prac. Reg. tit. Jury and Juror, p. 123, a case is cited of *East.* T. 24 *Car.* K. B.

(who were persons in poor, low, and indigent circumstances) should falsely assume and take upon themselves the characters of persons of good credit and reputa-

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where it is laid down that after a juror is sworn he may not go from the bar until the evidence is given, and the directions of the Court, for any cause whatsoever, without leave of the Court, and though he has leave he must have a keeper with him. But it is not stated, that if they disperse with leave, the subsequent verdict shall be void. In the case of the *King* v. *Stone*. *A. D.* 1796, 6 T. R. 530, 1, which however was an indictment for high treason, the Court having sat on the first day of the trial from nine oclock in the morning till ten o'clock at night without any interruption or refreshment, and the Attorney General stating that his evidence would occupy four hours more, and some of the jury being very much exhausted and incapable, as they declared, of keeping up their attention much longer, the Court adjourned till nine o'clock the next morning, Lord *Kenyon* observing that necessity justified what it compelled; and that though it was left to modern times to bring forward cases of such extraordinary length, yet no rule could compel the Court to continue their sitting longer than their natural powers would enable them to do the business of it. The jury retired to an adjoining tavern, where accommodations were prepared for them, and the bailiffs were sworn "well and truly to keep the jury, and neither to speak to them themselves, nor suffer any other person to speak to them touching any matter relative to this trial." The entry of the adjournment was in the following form:—*Thursday* next, after, &c. Forasmuch as it appears to the Court here, from the length of time which has been already occupied by the trial ofthe issue joined upon this indictment, and the further time which will be necessarily occupied by the same, that justice cannot be done if this Court proceed without intermission upon the said trial: It is ordered, that the jury empanelled and sworn to try the said issue have leave to withdraw from the bar of this Court, being well and truly kept by six bailiffs, duly sworn not to permit any person to speak to them touching any matter relative to the trial of this issue, and that the same jury shall again come to the bar of this Court on the morrow at nine o'clock in the forenoon. And it is further ordered, that the prisoner be again brought, &c.

After the evidence has been heard, and the jury retire to consider of their verdict, the oath administered to the bailiff who is sworn to keep them is as follows:—You shall swear that you shall keep this jury without meat, drink, fire, or candle; you shall suffer none to speak to them, neither shall you speak to them yourself, (not adding the words, touching any matter relative to this trial, as in 6 T. R. 530, 1, & *supra*,) but only to ask them whether they are agreed. So help you God. *Dalt.* c. 185; 2 *Hale*, 296; *Dick.* Sess. 223; *Bac.* Ab. Juries, G.; 1 *Chitty*, C. L. 632. Accordingly in *Com.* Dig. tit. Enquest, F, it is laid down, that after the evidence given the jury ought to continue together till they agree of their verdict, without eating, drinking, fire or candle, or speaking with any one, except the bailiff to know if they be agreed. *Co. Litt.* 227 b; 3 Inst. 29, pl. 13. 15 *Hen.* 7; 1, 2. If a great tempest happens, the jury may depart from the place where they are to consider of their verdict. So if a sudden affray happens, or if the

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tion, in opulent circumstances, and possessed of large property, and engaged in very extensive dealings as merchants, keeping large sums of money at their respec-

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house be upon the point of falling, *Vin.* Abr. tit. Trial, G g 4. cites *Bro.* Verdict, pl. 19, 14 *Hen.* 7, 29. *Per Rede, Davers, & Tremaile, Bro.* Jurors, pl. 13, S.C.* The same law seems to be of fire upon the house, *id. ibid.* *Vin.* Abr. tit. Trial. (G g 4.) So in *Com.* Dig. tit. Enquest, F.; if the jury separate on account of a great tempest they shall not be amerced. *Plowd.* 13 b. 15 *Hen.* 7; 1 b. 14 *Hen.* 7; 30. In 4 *Bla.* Com. 360. it is said, that when the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity, *Co. Litt.* 227. 3 Inst. 110. *Fost.* 27. *Gould's* case, *Hil.* 1764) till they have given in their verdict, but are to consider of it, and deliver it in with the same forms as upon civil causes, only they cannot in a criminal case which touches life or member give a privy verdict. But the Judges may adjourn while the jury are withdrawn to confer, and return to receive the verdict in open Court. In *Parke's* case, 2 *Roll.* Rep. 85. at *Nisi Prius*, a juror was challenged and withdrawn, and afterwards went out with the jury and stayed with them above half an hour. And by *Croke & Doddridge*, this act shall not set aside the verdict, unless it can be proved that they had new evidence given after they went out of Court, but it is a misdemeanour in him who was challenged, and punishable, 2 *Hale*, P. C. 308, 9. *Vin.* Abr. Trial, G g 4.—See also Lord *St. John* v. *Abbot*, *Barnes*, 441. This cause was tried at the *Northampton* Summer Assizes, 8 *Geo.* 2. before Mr. Justice *Reeve;* and after the evidence was summed up in the forenoon the jury retired to consider of their verdict; before the rising of the Court they came into Court attended by the bailiff to ask a question, which was answered, and they were sent back. At the sitting of the Court in the afternoon the Judge was informed that some of the jurymen (two or three) were in Court; whereupon being asked by him what they did there, answered they could not agree, and were thereupon sent back to their fellows, and afterwards a verdict was brought in for the plaintiff. The Judge did not certify the verdict to be contrary to evidence, and the Court were of opinion that this was a misbehaviour in the jury for which they were finable, but not a sufficient cause to set aside the verdict, and the plaintiff was not in fault. If the jury had eat and drank at their own expence, that is a misbehaviour for which they are finable, but their verdict must stand; though it is otherwise if they had eat and drank at the expence of either party. Rule discharged. See also 1 *Vent.* 124; 2 *Rol. Ab.* 715; *Hawk.* B. 2. c. 47. In *Bul.* Ni. Pri. 308. it is said, an officer of the Court ought always to be placed at the door of the box where the jury sit, to prevent any one from having communication with them, and when they depart from the bar they are to be attended by a bailiff sworn for that purpose. At the present day it appears that the jury will not be permitted to disperse after they have retired for the purpose of considering their verdict; although in a case of misdemeanour a dispersion of the jury, with the Judge's concurrence, on an adjournment taking place during the progress of a trial, will not be sufficient to avoid the verdict. Convenience seems to be in favour of this practice. It is always in the power of the Judge to prevent the jury from dispersing where the trial is of such a nature

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tive bankers, and paying ready money for divers large quantities of goods, wares, and merchandizes, and thereby, and by divers other false, artful, and subtle contrivances and stratagems, to cause the said *John Meyer* and *Henry Weiller* respectively, and the said *Joseph Leigh* and *Thomas Reeve*, to be represented and taken for respectable and opulent merchants of great credit, reputation, and punctuality in their dealings, and persons who might safely be supplied and trusted with large quantities of goods, chattels, wares, and merchandize, on credit, and to induce divers of the liege subjects of our said Lord the King to believe that the said *John Meyer* and *Henry Weiller* respectively, and the said *Joseph Leigh* and *Thomas Reeve*, were respectable and opulent merchants, of great credit, reputation, and punctuality in their dealings, and persons who might safely be supplied and trusted as aforesaid, and that they the said *John Meyer*, *Henry Weiller*, and *Joseph Leigh* and *Thomas Reeve*, should obtain and get into their hands divers goods, chattels, wares, and merchandize to a large amount, to wit, to the amount of fifty thousand pounds and upwards, of and from divers of the liege subjects of our said Lord the King, under colour and pretence of purchasing the same, and that they the said defendants should cheat and defraud the said subjects of the said goods, chattels, wares, and merchandize." The indictment then went on to charge them with other acts in pursuance of the said conspiracy, and there were sixteen other counts, varying the mode of charging the several defendants with being concerned in the said conspiracy. With respect to two of the defendants the counsel for the crown offered no evidence, and they were acquitted and afterwards examined for the

as to render it expedient that the jury should be kept together. Some consideration also seems due to the jury, who are in general men of active lives and regular habits, and are therefore likely to sustain great inconvenience by being totally prevented during the continuance of a very long protracted trial from any attention to their affairs, however urgent.

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prosecution; and other of the defendants had absconded and could not be found. At the trial before *Abbott* C. J. at the adjourned sittings at *Guildhall* on the 20th inst. the defendants *Mozely Woolf*, *Lewis Levy*, and *John Kinnear*, were found guilty.

Scarlett (with whom were *Pollock* and *Wylde*) for the defendant *Woolf*; *Knowlys* for the defendant *Levy*; and *Denman* for the defendant *Kinnear*, now severally moved, on their behalf, for a rule to shew cause why the verdict of guilty should not be set aside and a new trial granted, on the ground that the finding of the jury was invalid, the jury having dispersed and separated during the interval of an adjournment, before they delivered their verdict. The affidavits in support of this motion, which were made by the defendants themselves and their attorneys respectively, stated in substance, that the trial had lasted two days; that on the morning of the 20th instant the trial commenced at *Guildhall*, and about eleven o'clock at night, the case being then unfinished, the Court adjourned until the following morning, and that the jury separated and retired to their respective homes; (*a*) that the next morning they assembled again, and the case being concluded at a late hour in the afternoon of that day, they found the said defendants guilty; and that the said defendants and their respective attorneys were wholly ignorant of the fact of the jury having separated and retired to their respective residences, until after they had found their verdict.

Scarlett, in support of the motion for the defendant *Woolf*, contended that the two facts sworn to in the affidavits—1st, that the jury had separated before they pronounced their verdict; and 2nd, that the defendants

(*a*) The jurors were particularly addressed by *Abbott* C. J. who informed them, that they might retire to their families, but especially warned them not to have any communication with any person touching or concerning the matter in issue.

were wholly ignorant of the circumstance until after the verdict was delivered, were sufficient to sustain this application. This being a criminal proceeding, though only for a misdemeanour, the same principle which applied to felony and treason must be held equally to apply to all cases of the like nature, where a jury are impanelled to try the guilt or innocence of the party accused. (*a*) The authorities upon this subject seemed to go the length of establishing this proposition. Courts of Justice, from the earliest time, had watched with the strictest jealousy the purity of the trial by jury, both in civil and criminal cases, and had endeavoured to guard against the possibility of any undue influence in the administration of justice. The principal rule which seemed to have been established upon this subject was, that the jury in every case were not to be permitted to separate, after once impanelled and charged, until they delivered their verdict. In former times it seemed to be doubted whether this rule applied in civil cases, and until the case of *Rogers* v. *Smith* that point remained in uncertainty. (*b*) That was an action of ejectment, and a verdict passed for the plaintiff The Court were afterwards informed that three of the jury had sweatmeats about them, but which had not been given to them by any of the parties, and which had not been eaten by them. The Court however said, that it made the verdict suspicious, and that the jury were fineable for a misdemeanor. Afterwards, upon further examination, it appeared that the bailiff who had the custody of the jury had not been sworn, and *Broome*, the secondary, said that it had not been usual for the bailiff to be sworn in civil cases; but *Fanshaw*, clerk of the crown, and *Keeling*, his secretary, said that this was the practice on the crown side; upon which *Lea*, Chief Justice, commanded, that in future this should take

(*a*) But see the distinction taken between felonies and misdemeanours, *Hawk.* B. 2. c. 47. s. 1.

(*b*) *Palmer's* Rep. 380. *Trin.* 21 *Jac.* 1. K. B.

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place on the civil side as well as the criminal side. This case seemed therefore to establish the rule, which required that the jury should be kept in custody of the bailiff until they delivered their verdict, as well in civil as in criminal cases. In Lord *Delamere's* case (*a*) a question arose whether the peers who were assembled to try the prisoner for high treason, might lawfully adjourn the case to a future day, in order to give the prisoner time to prepare his defence. In answer to a request from the prisoner that the trial might be adjourned, as a great part of the day was spent, and the prisoner desired time to prepare for his defence, the Lord High Steward observed, that he entertained doubts whether it could be done by law. I take this Court, said his Lordship, to be of the same nature though of a degree higher, with the other ordinary Courts of judicature; and whether it be not obliged and tied up to the same method of proceedings with those other Courts where all capital offences are tried, is a thing I am in some doubt about. In those Courts it has not been usual to adjourn the Court after evidence given—nay, it has been sometimes a question whether the Judges in those Courts, after the jury are gone from the bar to consider of their verdict, could adjourn themselves—I say the Judges have sometimes made a doubt of it, though I know the point is now settled, and the practice is that they may and do. But this is most certain, after the evidence given, the jury cannot be adjourned, but must proceed in their inquiry, and be kept together till they are agreed of their verdict. The peers acted as a jury, and not as Judges. The question was propounded to the Judges, who deliberated upon the subject, and Lord Chief Justice *Herbert*, in communicating to the peers the result of the deliberation, expressed himself thus: "The question is, whether, after

(*a*) 4 *Harg.* St. Tr. 232, 1 *Jac.* 2. A. D. 1685; and *Kelyng*, 56.

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the prisoner is upon his trial and the evidence for the King is given, the lords being, as we may term it, charged, the peers triers may separate for a time, which is the consequence of an adjournment to another day. And, my lord, the Judges presume to acquaint your grace that this is a matter wholly new to them, and that they know not, upon recollection of all they can remember to have read, that either this matter was done, or questioned whether it might or might not be done in any case. Being, as it is, a new question, and a question that not only concerns the particular case of this noble lord at the bar, but is to be a precedent in cases of the like nature for the future, all that we can do is to acquaint your grace and my noble lords what the law is in the inferior Courts in cases of the like nature, and the reason of the law in those points, and then leave the jurisdiction of this Court to its proper judgment. My lords, in the first place, where the trial is by a jury, there the law is clear; the jury once charged, can never be discharged till they have given their verdict; this is clear; and the reason of that is, for fear of corruption and tampering with the jury. An officer is sworn to keep the jury, without permitting them to separate, or any one to converse with them; for no man knows what may happen, for, though the law requires honest men should be returned upon juries, and without a known objection, they are presumed to be *probi et legales homines*, yet they are weak men, and perhaps may be wrought upon by undue applications. This, my lord, it is said, fails in this case, because the lords that are to try a peer are persons of so great integrity and honour, that there is not the least presumption of their being to be prevailed upon in any such way, and for that reason, because of the confidence which the law reposes (and justly) in persons of their quality, they are not sworn as common ordinary jurors are, but are charged and deliver their verdict upon their

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honour. My lord, in the case of a trial of a peer in parliament, as your grace was pleased to observe, and as is very well known by late experience, there the matter has been adjourned till another day, and for divers days, the evidence being in several parcels; and there the danger is as great (if any were to be supposed) of tampering: but whether the lords, being judges in that case, and this case, only in the nature of a jury, makes the difference, though in both cases it is but like a verdict, for they give their opinions *seriatim*, whether the peer tried be guilty or not guilty, that they submit to your grace's consideration." The Judges declined giving any opinion upon the question whether the peers by whom the prisoner was to be tried might be allowed to separate in the case of a trial before the Lord High Steward, and in consequence no adjournment took place. In the result, Lord *Delamere* was acquitted of the treason with which he was charged. In the case of *Elizabeth Canning*, tried at the Old Bailey (*a*) for wilful and corrupt perjury, the trial lasted for seven days, the jury having adjourned every night. It did not appear, from the report of the trial, what became of the jury. [*Gurney*, of counsel for the prosecution in the present case, stated, that on the trial of *Hardy*, Mr. Justice *Buller* said, that Mr. Alderman *Newman* had informed him, that in *Canning's* case the jury had separated, for he had spent the evening with one of them.] The circumstance of the adjournment and separation of the jury was not brought before the Court, and whether the separation took place by consent or otherwise did not appear: It was therefore not a precedent one way or the other. In the report of this case in the State-Trials, the following queries are mentioned in a note, (*b*) as having been proposed amongst others, to Mr. *Emlyn* the barrister, and editor of *Hale's Pleas of the Crown*. *Query*.—"Is it agreeable to law, that a jury once charged with the evidence,

(*a*) 29th *April*, *A.D.* 1754. 10 *Har.* St. Tr. 206. (*b*) 10 St. Tr. 406, 7, 8, note.

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may be permitted to go at large before they have delivered in their verdict? *Answer.*—I am of opinion that though a jury once charged may, by consent of parties, be discharged wholly from trying the cause, yet I do not apprehend that the law will allow them to go at large in a criminal case while the trial is depending; for though in a long trial such a confinement may be inconvenient, yet I cannot find that the law has provided any remedy for it, it being in the eye of the law a less inconvenience than exposing the jury to be tampered with before they have brought in their verdict; yet I see not but that they may take refreshment and retire to rest in a place provided for them, provided that they be guarded by a sworn officer, that nobody be admitted to speak to them."—*Query.* "Suppose the jury, through surprise, inadvertency, or mistake, find a verdict of guilty, is there any remedy to prevent judgment in such case?—*Answer.* This is extremely difficult, unless some error can be shown upon the face of the record, which may be cause for arresting judgment. Perhaps the suffering the jury to go at large in the midst of the trial may be such a cause, as being a mistrial." In cases of high treason, the practice was to make a special entry of the cause of adjournment upon the record; and the jury, in such cases, were always kept together until they delivered their verdict: and in cases of felony, which affects the life, the same practice of keeping the jury together had always obtained. (*a*) The question therefore was, whether the case of a misdemeanour, being a criminal offence, was distinguishable in principle from crimes which affect the life. No satisfactory reason could be assigned for any such distinction, because the reasons upon which it was founded in offences of a higher nature, equally applied to misdemeanours. There were many substantial reasons why the same principle should be held strictly to apply to

(*a*) *Stone's* case, 6 T. R. 530. and the recent trials for high treason. The *King* v. *Watson*, *Trin.* T. 57 *Geo.* 3.

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cases of this description. The reason why the law required that the jury should be kept together, without being permitted to separate, was for fear they should be influenced in their decision by any extrinsic circumstance or indirect communication with other persons. The wisdom of this rule needed no illustration by example, but it must be confessed, that in those above all other cases it should be strictly observed, where popular feeling had been excited, or prejudices created by publications antecedent to the trial. In the present case, the offence imputed to the defendants had been long the subject of discussion in the public prints, and had occasioned considerable agitation in the commercial world. Under such circumstances, it was of the utmost importance to the administration of justice, that the jury should have been kept together, so as to prevent the possibility of having their minds biassed by any indirect communication before they delivered their verdict. The fact, of their having separated, was of itself sufficient to justify the Court in directing a new trial. They had gone to their respective homes; and in the interval of the adjournment which had taken place, it was not too violent a strain of the argument, to suppose that they might have had communication with some persons interested in the conviction of the defendants—that they might have had an opportunity of reading publications injurious to the case of the defendants—and that they might have imbibed from others impressions collateral to the evidence upon which they were called upon to decide. What took place in the Court at the result of the trial was an additional circumstance to shew that the jury might have been influenced in the verdict they had given, by the opinion which they might anticipate their fellow-citizens would entertain of their determination. Their verdict was received with shouts of applause, and under such circumstances, considering that the jury might have been influenced by the popular feeling which was known to prevail

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upon this subject, the Court perhaps would think this a case which required another trial. [ABBOTT C. J. said that what took placç when the defendants were convicted was very disgraceful.] The learned counsel said he was reminded by a learned friend, of a trial for perjury, of Mr. *Stocks*, at the *York* Assizes, before the late Lord Chief Baron *Thompson*, in which he was counsel for the defendant. An adjournment took place at his request, and the Chief Baron allowed the jury to separate, stating, that he relied on their honour that they would not suffer any one to speak to them. [*Raine*, *amicus Curiæ*, said, that in that case there was only one special juryman.] In the case of Lord *Cochrane* and others, the jury did not disperse; they were attended to their room by an officer, and kept together. [*Gurney*, who was of counsel in that case, said he believed the fact to be otherwise. He had understood from one of the jury, whom he saw lately, that they went home, the learned Judge having desired them not to have any communication with any body.] [BEST J. said he believed there were a great number of instances in which the jury, in cases of indictments and informations for misdemeanours, had been permitted to separate before they delivered their verdict. He remembered himself one case in *Surrey*, of an indictment for an assault on a Custom-house officer, when he was at the Bar, in which an adjournment took place, and the jury were suffered to disperse, but with a caution from the learned Judge to take care that they had no conversation with any person during the interval. He had no doubt that there had been a great many cases under the like circumstances.]

Knowlys, for the defendant *Lewis Levy*, followed the same line of argument with *Scarlett*, and cited several cases from *Giles Duncomb's* "Trials *per pais*, or the Law of *England* concerning juries by *Nisi Prius*,"(*a*)

(*a*) P. 249—252, 253. This book said to be of no great authority, *Willes*. 667.

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for the purpose of shewing the jealousy with which courts of justice had guarded against the possibility of undue influence upon the minds of jurors before they deliver their verdict. It was the practice of the whole criminal law, from the earliest time, that the jury should not be allowed to disperse till they had given their verdict. The practice was not confined to treason and felony, but extended to all cases where a jury are impanelled and sworn to deliver a verdict. The object was to keep them from all external influence, and unless express consent be given by all parties concerned, it was a mis-trial, and the jury had acted in a way that would avoid the verdict. This was the general principle. In 1 *Inst.* 227 b. it is said, "If the jury, after their evidence given unto them at the bar, do, at their charges, eat or drink either before or after they be agreed on their verdict, it is fineable, but it shall not avoid the verdict; but if before they be agreed on their verdict they eat or drink at the charge of the plaintiff, if the verdict be given for him, it shall avoid the verdict, but if it be given for the defendant it shall not avoid it; *et sic, e converso.* But if after they be agreed on their verdict they eat or drink at the charge of him for whom they do pass, it shall not avoid the verdict." By the law of *England*, a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat, or drink, or fire, and without speech with any, unless it be the bailiff, and with him only if they be agreed. (*a*) A bailiff is to be sworn in a civil as well as in a criminal case. (*b*) It had been held that the same evidence given to the jury, after they were gone from the bar, avoids their verdict, *Metcalfe* v. *Deane*. (*c*) The jury were gone from the bar to consider of their verdict, and one of the witnesses, before sworn on the defendant's part, was called by the jurors,

(*a*) 2 *Hale*, P. C. 296 & 297. 1 *Inst.* 227 *b.* (*b*) *Pal.* 380.
(*c*) *Cro. Eliz.* 189.

and he recited again his evidence to them, and after they gave their verdict for the defendant; and complaint being made to the Judge of the Assize of this misdemeanour, he examined the inquest, who confessed all the matter, and that the evidence was the same in effect that was given before, *et non alia nec diversa;* and this matter being returned upon the *postea,* the opinion of the Court was that the verdict was not good, and a *Venire facias de novo* was awarded. In *Trinity* Term 1653, between *Webb* and *Taylor,* copies of a bill, answers, and depositions were proved, but not all read, and delivered to the jury, who carried them with them from the bar in a bundle, which they laid by them, yet their verdict at the bar was set aside for this cause; and the Court would not regard their saying that they did not read them, for they might say that to save themselves, it being a fault to take any thing without the Court's knowledge. (*a*) If one of the parties say to the jury, after they are gone from the bar, "You are weak men, it is as clear of my side as the nose in a man's face," this is new evidence, for his affirmation may much persuade the jury, and therefore shall quash the verdict. (*b*) So if any thing be read to them which they ought not to have with them, as a book of depositions, some whereof were not read in evidence. (*c*) So if any of the parties servants speak to the jury, and the verdict goes for his master, it may be quashed; but if for the other side, it is only fineable. (*d*) The plaintiff delivered an escrow to a juror impanelled before he was sworn, who afterwards being sworn, and gone with the jury from the bar to consider of the verdict, shewed the same escrow to his companions, who found for the plaintiff. The minister who kept the inquest informed

(*a*) *Roll.* tit. Trial, 714. pl. 6. *Com. Dig.* Pleader, s. 45.
(*b*) *Roll.* tit. Trial, 716. pl. 20. S. P. *Com. Dig.* Pleader, s. 45.
(*c*) *Prat's* case, 21 *Jac. Roll.* tit. Tr. 716. pl. 19. *Com. Dig.* Pleader, s. 45.
(*d*) *Hunt* v. *Locke,* 1 Keb. 300.

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the Court hereof, and the jury being examined, confessed the matter aforesaid, upon which judgment was stayed; for after the jury are sworn, they ought not to see nor carry with them any other evidence but what was delivered to them by the Court; afterwards the plaintiff said, that the escrow proved the same evidence which was given to them at bar by him, wherefore it was not so bad as if it had been new evidence not given before, *sed non allocatur.* (*a*) All these cases evinced the caution with which Courts guarded against the possibility of any undue influence upon the minds of jurors. In the present case the jury had dispersed before they received any caution from the learned Judge, and in fact his Lordship was not aware that they intended to separate. (*b*) If in any case the dispersion of a jury could be dangerous, it was particularly so in this case, for here a great ferment was excited in the public mind, and the verdict was received with shouts of applause. The authority of Lord Chief Justice *Herbert* in Lord *Delamere's* case was decisive, that the jury, once charged, can never be discharged till they have given their verdict, for fear of corruption and tampering with the jury. In the present case the jury were at least exposed to the possibility of such an inconvenience, by having been separated for several hours. What communication might have been had with them during the interval of their separation, could neither be known to the Court nor to the defendants, but the bare possibility of such a communication, and the hazard of their having been tampered with, was sufficient to entitle the defendants to a new trial.

Denman, for the defendant *Kinnear*, pursued the same course of argument. He urged that neither his client, the attorney, nor himself, were aware of the dis-

(*a*) 11 *H.* 4. 17 Roll. tit. Tr. 711, pl. 8. (*b*) But see *ante*, 406, n. (*a*)

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persion of the jury till after the verdict. In his view of the subject, he unfeignedly declared that a more important case never came before a court of justice; for if a jury were allowed to disperse, verdicts might hereafter be returned by twelve men, not upon the evidence adduced at the trial, but under a variety of collateral impressions. Nothing could authorize the dispersion of the jury, unless it was most expressly and distinctly consented to by the defendants. Certainly nothing of that kind appeared before the Court, and therefore, under the circumstances stated, the defendants were entitled to a new trial, considering that it was possible the jury might have received some undue impressions from an inflamed multitude, whose minds were heated upon this subject. The checks which were applied by law to evidence, could not guard the mind of the jury against those impressions, which a thousand extraneous circumstances might produce in the consideration of the verdict. It was not incumbent upon the defendants to shew that the jury had been tampered with, or had received any undue impression, it being sufficient for the purposes of the present motion, that they had the opportunity of being exposed to improper influence. It has been held, that the bare possibility of a jury seeing papers which ought not to have been submitted to them, is a sufficient ground to set aside the verdict. (*a*) Here the jury had an opportunity of seeing the observations in the public prints, after the proceedings of the first day. If it be laid down that the jury may be separated in any case without the consent of the parties, it would be a most dangerous principle in the administration of justice, for who is to define the length of time during which they might be separated? [BAYLEY J. Put the case the other way. Sometimes a Judge goes out during a trial, but returns immediately: it frequently happens

(*a*) 2 *Rol.* Abr. 714, l. 25; *Com. Dig.* Pleader, S. 45.

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that some of the jury retire during a trial, but return again immediately; but will it be said that because they have separated, and because they have the opportunity of communicating with some persons during the interval, that that will avoid their verdict?] Such a retirement is for unavoidable purposes, well understood by all parties; and the only answer that can be offered to this objection is, that in such cases the jury retire in the presence of all parties, and if any suspicion arises of an improper communication with them, it is immediately checked; but in almost all these instances the jury are accompanied by an officer of the Court. The line must be drawn somewhere, and the Court will hardly lay it down as a principle, that in all cases of an adjourned trial the jury shall go wherever they please. The established rule in almost all such cases has been that the jury, during the interval of an adjournment, shall be attended by a bailiff, sworn to keep them together. In Doctor *Watson's* trial, (*a*) which lasted many days, the jury were kept together under the guard of the bailiff. So in the protracted trials of 1794, steps were taken to prevent the possibility of any communication with the jury during adjournment. (*b*) In all cases of this description, there must be the express consent of the defendant to the separation of the jury. No trial ever took place in the presence of an auditory more inflamed than that in whose presence this case was tried.' The jury, upon their adjournment, were permitted to pass through an inflamed multitude, and imbibe the impressions which such a multitude were so well calculated to impart; and no account could be given of what conduct they pursued between the hour of their separation and their meeting again. They went to their respective homes, and returned the next morn-

(*a*) A. D. 1817. 2 *Stark.* 116.

(*b*) Trials of *Hardy*, *Tooke*, &c. A. D. 1794. V. 6 T. R. 530, note a; *Bac.* Abr. Verdict. And see *Rex* v. *Stone*, 6 T. R. 530, 1.

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ing, not in a body, but separately. No distinction, in principle, could be made between the case of a misdemeanour and that of treason or felony. If it be laid down as a general principle, that the jury are not to be tampered with in cases of felony or treason, was the Court prepared to say that they might be tampered with in cases of misdemeanour? for if the Court refused the present application, they would be reduced to the necessity of making this acknowledgment. It was to be hoped, however, that the Court would put this matter into a course of discussion, in order that, if this is to be the law of *England*, it might not become so without the fullest and most serious consideration.

The Judges, after deliberating a few minutes, delivered their opinions *seriatim*.

ABBOTT C. J. If we entertained any doubt upon a question of this kind, which is of importance by reason that the subject-matter of it relates to the trial by jury, we should pronounce a very deliberate opinion; but as none of us do entertain any doubt, it is unnecessary to take any further time for consideration. I am of opinion that there is no sufficient foundation for the present application. The application is grounded upon the suggestion of these two facts: 1st. That the jury had dispersed during the night: and 2dly, That that fact was not known to the defendants until after the trial was over. Now, the trial began between nine and ten in the morning; it had proceeded until eleven o'clock at night, or later, before the evidence on the part of the prosecution was closed. Learned counsel were employed separately for several defendants. It must be assumed (and nobody could assume to himself the contrary) that in that stage of the case evidence would be laid before the jury on the part of the defendants. It became matter therefore of necessity that the trial

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should be adjourned, and an adjournment accordingly took place from the necessity of the case, the jury being fatigued both in mind and body; and it would have been most injurious to the case of the defendants, even if the Judge and jury had had strength enough to go on till the trial came to a close; I say, most injurious to the case of the defendants, if their case was heard by persons whose minds were exhausted with fatigue, as it would have been if an adjournment had not taken place. An adjournment of this nature is not necessarily followed by the dispersion of the jury, for in many cases (and in many cases they ought) they are kept together till the final close of the trial. But I am of opinion, that in case of a misdemeanour, their dispersion does not vitiate the verdict; and I found my opinion upon the admitted fact, that there are many instances of late years, in which juries upon trials for misdemeanours have dispersed and gone to their abodes during the night for which the adjournment took place; and I consider every instance in which that has been done, to be proof that it may be lawfully done. It is said, that in some of those instances the adjournment and dispersion of the jury have taken place with the consent of the defendant. I am of opinion that that can make no difference. I think the consent of the defendant in such case ought not to be asked; (*a*) and my reason for thinking so is, that if that question is put to him, he cannot be supposed to exercise a fair choice in the answer he gives, for it must be supposed that he will not oppose any obstacle to it; for if he refuses to accede to such an accommodation, it will excite that feeling against him, which every person standing in the situation of a

(*a*) In 6 T. R. 530, note a, it is mentioned, that on the trial of *Hardy* the adjournment was stated to be made by the consent of the prisoner; but on the second trial (that of *Horne Tooke*) the Judges who sat having in the mean time conferred with the rest of their brethren, said, they were clearly of opinion it might and ought to be done by the authority of the Court, without calling on the prisoner for any consent.

defendant would wish to avoid. I am also of opinion, that the consent of the Judge would not make, in such case, that lawful which was unlawful in itself; for if the law requires that the jury shall at all events be kept together until the close of the trial for a misdemeanour, it does not appear to me that the Judge would have any power to dispense with it. The only difference that can exist between the fact of the jury separating with or without the approbation of the Judge, as it seems to me, is this, that if it be done without the consent or approbation of the Judge, express or implied, it may be a misdemeanour in them, and they may be liable to be punished; whereas, if he gives his consent, there will be no such consequence of a separation. But though it may be a misdemeanour in them to separate without his consent, it will not avoid the verdict in a case of this kind, as it would if the law required the jury to be absolutely kept together. Now it is not surmised in this case, that during the night (for it was during night only that the separation took place) any attempt was made to practise upon the jury. If any thing like that could have been shewn, the Court would require that matter to be investigated. But it is not even suggested that any such thing took place. All that is suggested is, that in point of fact the jury were allowed to go to their own homes in order to take there the necessary refreshments, which they might have had at some other place with much less convenience to themselves. (*a*) That is all that is suggested. I have already intimated, that the separation of the jury without the previous concurrence of the Judge, might be a misdemeanour in them. It seems to me that the law has vested in the Judge the discretion of saying whether or not, in any particular case, it may be allowed to the jury to go to their own homes during a necessary adjournment, throughout the night. There

(*a*) Vide *Com. Dig.* Pleader, S. 11.

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are many cases in which the law vests a discretion in the Judge. Those who fill that office (I am sure I may so say of myself) consider themselves bound down by the rules of law, and the less they are armed with discretion, the more satisfactory to themselves are the duties they have to perform. It has been said in this particular case, that what took place at the close of the trial furnishes an additional argument to shew that the jury ought not to have been allowed to separate. I was greatly concerned at what did take place. The verdict of a jury, in whatever case it may be given, ought to be received with reverential silence, whatever may be the sentiments of those who are auditors, whether they approve of or dissent from the opinion which the jury have delivered. I must own, I think such conduct as that I have mentioned on the part of those who are present in a court of justice, is at all times very reprehensible, because juries may possibly be influenced by the manner in which they may imagine their verdict would be received, instead of attending to the evidence, and acting according to the result of their own honest judgment. They are to attend to the evidence, and give their verdict according to their own dispassionate view of the case submitted to them, without considering what opinion may be produced in the mind of the world at large, because none but themselves can judge of the propriety of what they do. For these reasons it appears to me that there is no ground for the present application, and I conceive we ought not to give any reason to suppose that any doubt exists, when none really exists in our minds.

BAYLEY J. It is no part of this application that the verdict was contrary to the evidence, and that upon a new trial there could be any fair ground for expecting a different result from the evidence upon which this conviction has taken place. It is put upon the plain,

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simple, dry ground, whether, because the jury separated and the defendant gave no consent to that separation, and did not know until after the verdict was given that that separation had taken place, he is, as a matter of right, entitled to call upon the Court to vacate the verdict and grant a new trial. Now upon that naked point it seems to me that he has no right to make such an application. In almost every trial it is in the experience of persons who attend courts of justice, the Judge as well as the jury are occasionally absent for a short period. That is very often so, and perhaps it may be said improperly. But they go out only for a few minutes. If, then, a separation for a night will vacate a verdict, why may not a separation of two minutes vacate a verdict? It is said in that case the parties have the opportunity of seeing the separation, and making any objection. But in the case of a prisoner who does not know what the law is upon the subject, he may be tried and convicted on account of his ignorance of the law,—he may not know how the objection ought properly to be made, and it would be hard upon prisoners if their silence in that respect were to operate to their prejudice. On the contrary, it would be the duty of the Judge to interpose in their behalf as counsel for them, and say that inasmuch as some of the jury had separated, no verdict could be given, which would be good in law, and therefore direct the trial to be stopped. (*a*) Every object and purpose of justice is effectually answered, and every supposed inconvenience is effectually rebutted by the law as it stands; for as the law now stands, if the jury separate without consent, and improperly so, it is in the discretion of the Judge who tries the cause to impose upon them such punishment and fine as he may think fit. If the jury disperse without consent they are guilty of a contempt, and the

(*a*) See, as to the doctrine of the Judge being to be considered in the light of counsel for the prisoner, 1 *Chitty's* Crim. Law, 407.

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Judge may punish that contempt by fine; but that is matter of discretion, and matter of discretion only. If the verdict, when it is ultimately pronounced, and when contrasted with the evidence, appears fairly to admit of doubt, and if persons could hesitate upon the question whether another jury would come to a different conclusion, we might take into consideration that the jury had separated. But when the fact of separation *per se*, is urged as a ground for a new trial, it is of no weight. That is laid down as a general principle, and as that is the only ground upon which this application is made to vacate the verdict, I think it is not sufficient. If this be a valid objection we do not do any injustice by discharging this application; for if the separation of the jury vacates the verdict, the parties have the opportunity of so doing by bringing a writ of error, assigning as matter of error that before the jury gave their verdict, they separated; and then if the law be, that every separation of a jury vacates their verdict, the defendants would be entitled to the benefit of that opinion upon such an application. I state that, not because I have the least doubt upon the question, but if it were a valid legal objection, that is the legal course to be taken. It appears to me that we do no injustice in this particular case by refusing this application. This objection *per se*, affords no foundation whatever for vacating a verdict, where, upon the whole of the evidence in the case, there does not appear any ground for a suggestion that a different verdict would be the result of a new trial.

HOLROYD J. I am entirely of the same opinion—that a separation of the jury does not render the verdict invalid. I do not find any authority in law which says that the separation of the jury in a case between party and party, or in the case of a misdemeanour, does

avoid the verdict. If the jury are guilty of any improper conduct in any separation, which ought not to take place without the authority of the Court, they may be guilty of a misdemeanour, and may be fined and punished as such; but it appears to me that that would not avoid the verdict. In case any probable mischief is likely to result from a separation, without any care being taken to prevent it, either from the inattention of the Judge, or upon any suggestion of that kind, you may direct such measures to be taken as shall prevent the effects of such separation, assuming under such circumstances any mischief is likely to arise. It appears to me however to be matter that will not avoid the verdict; but if it is, it will still be matter of error, and the defendant will not be prevented from obtaining judgment upon it by bringing a writ of error, supposing it to be in point of law a sufficient objection to invalidate the verdict. I agree with the rest of the Court in this case, that there is not sufficient ground upon which we ought to grant a new trial. If it appeared that in the course of a separation the jury had received any improper suggestion, or had found their verdict upon evidence contrary to that which was laid before them in Court, that would be a sufficient ground to doubt the propriety of the verdict. This would be a ground upon which the Court must and ought to proceed, if any doubt remained in consequence of their separation, or any thing that passed in the interval, or considering the verdict with reference to the evidence, whether the jury had come to a right and proper conclusion, or whether they had come to a mistaken determination in consequence of any thing they had heard out of doors. Nothing however of that kind is suggested in the present case, and therefore I think there is no sufficient ground made out for granting a new trial.

BEST J. I am of the same opinion. It is insisted

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here that this is a mis-verdict, and that no legal verdict has been given. Now I am alarmed at the extent to which the proposition contended for may be carried if it is well founded, for, if this is a mis-trial in consequence of the separation of the jury, I cannot discover any distinction between a separation for a minute and a separation for a considerable period of time; for if the argument is right, it is right to this extent—that if by any accident a juryman gets out of the box for a single minute, it is a mis-trial. Let us see the extent of mischief to which this doctrine may be carried. Suppose in the case of a trial for capital felony some of the jury by accident get out of the box, and the prisoner in the result of the trial is acquitted, the consequence of this argument would be that it would be a mis-trial, and the man must be put on his trial again. That is a consequence that alarms me, and I do not feel that we ought to give any countenance to an objection which would go to such a mischievous extent. There is not enough in this case to satisfy my mind that we ought to grant a new trial upon this ground. Several cases have been cited, and it appears that the only one which touches this question is that of Lord *Delamere* in the 4th *State Trials*, where the Judges appeared to have said, that the jury once charged cannot be discharged. That that might be law at one time I have no doubt, but the practice for a long period of time will shew what the law is, and I believe there is no Judge who has sat for any length of time in this hall that has not known and approved of discharges of juries. The constant and uniform practice which has existed for a considerable length of time, will shew that what is stated in Lord *Delamere's* case is not now to govern our decision. With respect to the case in *Palmer's Reports*, the only effect of that is to shew that refreshments are not to be given to a jury who are sent out to deliberate upon the verdict, for the oath which is adminis-

tered to the bailiff who has the custody of them, is, that they shall not have any refreshment till after they have agreed upon the verdict. That case therefore has nothing to do with the present question. With respect to all the cases cited from the trials *per pais*, those were cases where improper practices had been adopted by one of the parties, which might influence the decision of the jury in his favour; and certainly it would be highly improper that any man should have a verdict by undue means. It is not suggested here that any such practices have taken place, and therefore it does not appear that any one of these cases apply. It may be very often extremely inconvenient and improper that the jury should be permitted to separate before they deliver their verdict; but in such cases the Judge is vested with a discretion upon the subject, which he will exercise on his own motion in keeping the jury together, or if either of the parties desired it, no Judge would refuse such an application. If it were stated by either of the parties that there is cause to apprehend that some improper practices might take place if the jury were separated—that by mixing with the multitude they might imbibe their feelings, or that they might be influenced in their verdict by any communication with the crowd, there is no Judge who would not prevent that from taking place by keeping the jury apart from the multitude till they gave their verdict. But if any such application were made by either of the parties, I do not see how it could be complied with in such a case as this, unless the party applying undertakes to defray the expense attendant upon keeping them together; for in the case of a misdemeanour I do not understand where the expense is to come from, for I do not agree in the propriety of keeping the jury shut up for a number of days at their own expense. It appears to me, however, that no mischief can result from allowing juries to separate, a discretion being always

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vested in the Judge as to the propriety or impropriety of keeping them together, in each particular case. It has been stated that the public mind has been greatly agitated upon the subject of this particular case by publications circulated in the world antecedent to the trial, and that consequently such publications must have operated to the prejudice of the defendants. I wish that that subject might fairly be brought under the consideration of the Court, for there is nothing more mischievous to the administration of justice than the discussion in print of cases which are to be submitted to a court and jury. The learned counsel have stated unanswerable reasons why that practice should be put a stop to, but that does not furnish any argument why a new trial should be granted.

Rule refused.

Thursday, May 6th.

On the motion of *Gurney*, the defendants were committed to Newgate, and ordered to be brought up to receive sentence on a following day. Accordingly on the 14th day of *May* the defendants being brought into Court, judgment was passed upon them as follows: *Mozely Woolf* to be imprisoned in the House of Correction for the county of *Middlesex* for the term of two years, to pay to the King a fine of 10,000*l.* and that he should be further imprisoned until the fine was paid; *Lewis Levy* to be imprisoned in his majesty's gaol for the county of *Gloucester* for the like term of two years, to pay to the King a fine of 5000*l.* and that he should be further imprisoned until the fine was paid; and *James Kinnear* also to be imprisoned for the like term of two years, in his majesty's gaol at *Ilchester*. In execution of this sentence, the defendant *Woolf* was committed to prison; and on a subsequent day,

Judgment of imprisonment of three defendants in separate gaols; and of fines upon two, and imprisonment till such fine be paid.

Saturday, May 15th.

Chitty moved that a writ of *levari facias* might be issued against the goods of the said *Mozely Woolf*, in

Where a defen-

dant convicted of a misdemeanour, was sentenced to be imprisoned for two years and to pay a certain fine, and to be further imprisoned till the fine is paid, held that a *levari facias* might issue for the fine before the expiration of the two years.

order to levy the fine which this defendant had been adjudged to pay. The affidavit in support of the motion stated, that the Court had pronounced judgment against the defendant on an indictment for conspiracy, and had sentenced him to be imprisoned for the term of two years, and to pay a fine to the King of 10,000*l*. and to be further imprisoned until such fine was paid; and that on the 14th instant persons, by the directions of the said defendant, were in a hurried and clandestine manner carrying away his goods, with intent to ship them out of this country, and thereby avoid the payment of the fine. In support of the application it was submitted, that though it was not usual to enforce payment of the fine until the term of imprisonment expired, yet, in reason and in law, there was no impediment to an immediate execution, especially where strong grounds were laid before the Court of suspicion that so much of the sentence as related to the fine would, by the fraudulent removal of the property, be rendered inoperative. The judgment is general, "that the party do forfeit and pay the fine;" and there are no words giving time for the payment of it, for the words, "and that the defendant be further imprisoned after the expiration of the two years, until the fine shall have been paid," are introduced only for greater security, in order to render it the duty of the officer to detain the defendant in custody after the two years have expired, in case the fine should not have been previously satisfied. The judgment therefore makes the fine payable immediately, like the judgment in a civil action, "that the plaintiff do recover," upon which he may immediately issue execution. The King must have at least as extensive remedies for such a fine, as a subject would have in a civil action. It is in the nature of a debt to the crown, and may be levied of the body, land, or goods, of the party, *instanter*. If not, a defendant might elect to lie in gaol after the expiration of the fixed term of

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imprisonment, and never pay the fine, and then a material part of the sentence of the Court would be rendered nugatory. It was admitted that no instance had been found in modern practice of a *levari* or other process issuing for a fine during the time of imprisonment, but the absence of authorities or precedents could not alter the legal effect of the judgment.

Bayley J. (*a*) after conferring with Mr. *Dealtry*, said, that unless the judgment, as pronounced against the defendant, authorized the issuing of execution to levy the fine, he did not see upon what ground the process could issue. No instance was known in the Crown-office, in which the Court had directed a *levari* to issue under similar circumstances; and as no instance had been cited at the bar to authorize such a proceeding, the Court could give no directions upon the subject. The Court did not authorize the issuing of such process, but if it might lawfully be issued, the law was open to the party at whose instance the application was made.

Holroyd J. and Best J. concurred.

In consequence of this intimation, search was made for precedents to justify the issuing of the *levari facias*, and the following authorities were discovered; namely, *The King* v. *Wade*, *Mich.* 33 *Car.* 2. *Skinner's* Rep. 12. in which book this case is reported as follows. *Wade* was fined 100*l.* for barretry, which was levied by *levari facias*; and Sir *Thomas Culpeper* moved, how that he was farmer of the duchy of *Lancaster*, and had all fines, &c. granted, and that the patent was acknowledged by the attorney in the Exchequer, and therefore prayed that he might have this fine. The Court said, that he must plead his patent there, before they could take

(*a*) *Abbott* C. J. was absent at *Guildhall*, holding the *London* Sittings.

notice of it; and that if they should pay this fine to him, the clerk of the crown, who is accountable unto the Exchequer, would have nothing to shew, and therefore said, he would do well to get an order out of the Exchequer. And *Dolben* said, how that the archbishop of *Canterbury* claimed such fines in *Croydon*, and how that Chief Justice *Hide* would not allow them, till the patent was pleaded and acknowledged in that Court. S. C. by the name of The *King* v. *Wade*, *Mich.* 33 *Car.* 2.— Sir *Thomas Jones*, 185. "A *capias* issued against the defendant for the fine of 100*l.* set on him after conviction, upon an indictment of barretry, and afterwards *a fieri facias, on which the sheriff of Essex levied the fine,* and prayed an allowance of poundage for it out of the monies in the hand of the clerk of the crown, paid the said sheriff for the said fine, which was granted him by the Court, though there be no precedent in the said Court to warrant it. But the Barons have always made such allowance in the Exchequer after the monies paid there by the clerk of the crown." S. C. by the name of The *King* v. *Webb*, *Mich.* 33 *Car.* 2. Upon motion against the sheriff of *Essex*, for taking money, &c. in execution, it was ruled by the Court, that though one be in execution for a fine to the king, yet a *levari facias* lies *de bonis & catallis*, and by such writ the sheriff may take ready money; and here was cited, in *Kelynge's* time, one *Cadmore's* case, the same rule." Search being made in the Crown Office, the proceedings in this case were found recorded; and it appeared that a *capias ad satisfaciendum*, tested the 9th day of *June* in the 33d year of the reign of *Charles* the Second, was issued against the defendant *John Wade* (of *Halstead*, in the county of *Essex*); and afterwards on the 22d of *June*, in the same year, a *levari facias* was also issued. The writ of *levari facias* was as follows: (33 *Car.* 2. As yet of the Term of the Holy Trinity. *Astry*. Roll. 199.) *Essex*, to wit. To the sheriff of *Essex*, greeting: We

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command you that you omit not, on account of any liberty in your bailiwick, but that you cause to be levied of the goods and chattels lands and tenements of *John Wade*, of *Halstead* in your county, gentleman, one hundred pounds imposed upon him the said *John Wade* for his fine on the occasion of certain trespasses contempts and ——— (in the *capias* this word was *perjurii*, although, according to the report in *Skinner*, the defendant appears to have been indicted of barretry,) whereof he was impleaded, and whereof by a certain jury of the country in that behalf taken between us and the said *John* he is convicted, as in our Court before us appears of record: And have that money before us from the day of the *Holy Trinity* in three weeks, wheresoever we shall then be in *England*, to satisfy us of his aforesaid fine; and have there this writ. *T. F. Pemberton*, at *Westminster* the 22d day of *June* in the 33d year of our reign. *Astry*.—On the authority of the case of The *King* v. *Wade*, writs of *levari facias* were in the present case issued from the Crown Office into *Middlesex* and *London* against the defendant *Woolf*, and property was taken thereon to the amount of 8000*l*.

Saturday, May 22d.

F. Pollock this day moved for a rule to shew cause why these writs of *levari facias* should not be set aside, on the ground that they had issued without any sufficient authority in law. The affidavit on which he moved simply disclosed the fact of such writs having issued, and that a very considerable quantity of the defendant's property had been taken under them, both in *London* and *Middlesex*. He had looked in vain for authorities to justify the issuing of this writ; and with one single exception, as to something that had passed in the case of the *King* v. *Webb*, (*a*) otherwise reported under the name of the *King* v. *Wade*, *Skinner* 12, and

(*a*) 2 *Show*. 173.

Sir *Thos. Jones* 185, nothing could be found to warrant this proceeding. It was somewhat remarkable that in each of these places the case was reported for different purposes. In *Shower* it was reported as an authority that the sheriff might take money in execution when the execution is at the suit of King; and for that purpose it is cited as an authority in *Vin.* Ab. tit. Execution. In Sir *T. Jones's* Reports it was mentioned as an authority, to shew that the sheriff was entitled to poundage upon the fine which the defendant was sentenced to pay; and as reported in *Skinner,* the object was to shew that the Court would not take notice of the right of a grantee to fines imposed by the Crown upon the defendant, unless the patent was previously pleaded and acknowledged in the Court of Exchequer. [BEST J. The case goes farther in *Shower.* It was ruled by the Court that any one being in execution for a fine at the suit of the King, the sheriff may take ready money.—BAYLEY J. It appears by the report of the case in *Skinner* that there was a third person interested, who claimed the fine in respect of his being farmer of the Duchy of *Lancaster,* and in the result we are to presume from the report that the fine was paid to him upon the acknowledgment of his patent in the Court of Exchequer.]—Undoubtedly that was to be presumed from the case as there reported: but at the same time it must be observed that there was no person who had an interest in disputing the claim thus made, and no person did in fact dispute it.—[BAYLEY J. Surely the defendant had an interest in disputing it, but he did not come in.]—It certainly did not appear that the defendant had come in, but it was to be hoped that the whole of this kingdom was not to be concluded, because 140 years since when that question was agitated, the defendant did not come in. It did not appear that the principle of that case had ever since been acted upon, and it was too much at this time of day to hold that

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case as conclusive upon the subjects of these realms.—[ABBOTT C. J. The principle upon which that case is decided is the principle of the common law, namely, that the King may take body, goods, and lands.]—No authority could be found for this.—[BAYLEY J. You will find it in Lord Chief Baron *Gilbert's* Exchequer, where he says "There is a writ called a long one, which takes the body, lands, and goods."]—That is the writ of extent.—[BAYLEY J. But you suggested that there was no authority which said that the King could take body, lands, and goods.]—There is no authority to be found which says that the King may take body, lands, and goods, for a fine imposed in this Court. Under the title *Judgments and Execution*, 3 Inst. c. 101, 218, it is observed by Lord *Coke*, that when it is said by the judgment that the defendant has forfeited his lands and goods, then the King may have execution and may take the lands and goods of the defendant; but when he speaks of a fine as distinguishable from an amerciament in this Court, he says, "It is to be observed that whensoever the delinquent or defendant is to be fined, the judgment is *quod capiatur*, that is, to be imprisoned until he doth pay his fine." In Reg. Brev. and in *Fitzherbert's* N. B. no writ was to be found applicable to the case of a defendant fined in this Court, which could be taken out immediately to levy the fine on his goods and chattels. The writ of *levari facias* is described by *Fitzherbert* merely as a remedy for enforcing a recognizance, and not for enforcing the payment of a fine. This application was made, in point of law, solely on this ground—that the writ had issued on the authority of a case to which the defendant himself was no party. The defendant *Wade* had no interest in disputing the application, for he was obliged to pay the fine one way or the other. He was not before the Court in that case, and it would be assuming too much at the present moment, that a

rule such as that should be considered as having been promulgated and adopted in a case never since acted upon—a case which passed *sub silentio*, and in which the person mainly interested had never come forward to dispute it. The total absence of any other authority for a period of 140 years, when it was notorious that the crown must have been interested on a variety of occasions in issuing such process, would be a very strong argument for the Court, not to confirm the proceeding in this case, but at least to grant the indulgence of having the question put in a train of deliberate discussion. This was an extremely grave question. The effect of issuing these writs would be to interfere with the mercy of the crown, and prevent the crown from pardoning the fine, should any circumstance arise to induce it to interpose on behalf of the defendant. For any thing that appeared at present, these writs had been issued without the authority of the officers of the crown. [ABBOTT, C. J. Have you any affidavit which states that the writs have issued without the authority of the crown?] The affidavits certainly did not state that fact, and indeed it was impossible for the defendant to procure an affidavit of that description. It was a strong argument, however, in support of the suggestion, that during a period of 140 years, the crown, in cases of this sort, had never ventured to interpose in this manner; and it was to be hoped that an authority to be found at a period of history, to which the Court would not naturally look back for much wisdom, either in politics or in law, ought not to govern a question of this importance in the present enlightened age. On these grounds, both in point of law and in the absence of any well authenticated precedent, the defendant applied to the Court for its protection under circumstances which raised a strong presumption that the process had not issued with the authority of the crown. [BAYLEY J. As you say you have no affidavit that the writs issued without the

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authority of the crown, the Court cannot act upon any speculative conjecture.] Certainly the rule could not be taken on that ground; but independently of that, he submitted there was doubt enough in the case to warrant the Court in granting a rule to shew cause. Instructions had been given him to move for a stay of proceedings, but he was aware that the Court, in a case of this description, could not interpose in that way. The same effect, however, might be produced, if the Court were to give directions that the money levied should be paid into the hands of the sheriff, or if security were given for that purpose. The property of the defendant being taken in this manner, would be attended with most ruinous consequences to him, and much more than the Court contemplated, at the time they imposed the fine, however severely they intended to punish him. [ABBOTT C. J. Are you instructed to pay the money or give security?] He had no such instructions, but he submitted that as the consequences resulting from this proceeding were such as the Court did not contemplate, the case at least deserved further consideration. [BAYLEY J. The Court contemplated that payment would be made.] But not that payment would be made in this forced manner. The defendant was prepared to give security to the amount of the property taken under the levy, but not the whole amount of the fine. [ABBOTT C. J. Does the defendant swear that the effects seized are all he has? For the purpose of making an application of this kind, you must lay some special grounds.] Certainly no special ground was relied upon; but inasmuch as, the seizure of the defendant's goods would be attended with the most serious consequences, the defendant would enter into such terms as the Court should think fit to impose upon him, in order to the consideration of the question for the first time urged, since law had obtained in this land.

ABBOTT C. J. The present application to the Court is not made on any particular circumstances of fact, but on the general question of the legality of this writ. If there were any particular circumstances of fact, as to its having issued by an improper person, or without proper authority, or if the mode taken to levy the fine was more severe upon the defendant than justice required, he being ready to pay the money to redeem his goods, without having them sold in the way property is generally sold under such proceedings, then the law would not preclude the party from making a special application to set aside the writ. But nothing of that kind appears before the Court. Upon the law of the case, if we entertained any reasonable ground to doubt, we should grant a rule to shew cause, but as we entertain no doubt, we ought not to put some other person to any expense in answering such a rule. Now it is said that this writ had issued upon the authority of a single case, decided in the reigns of the house of *Stuart*, and we are invited to consider that the cases decided in those reigns are not to be holden as law. I am of opinion that there is no objection to those decisions upon that ground, and we are bound to consider them as law, unless the law has been altered since that time by act of parliament. The law has been altered in many particulars by act of parliament, but the common law as it existed then is not altered, and is the same now as it was then. It is a mistake to suppose that what has been done in this case rests merely upon the authority of that decision, because that decision itself rests upon a principle of the common law—the principle of the common law being that the crown, who represents the public, is entitled to levy for a debt due to the crown by the united process against the body, the lands, and the goods of the defendant. In this case however there has been as yet no process against the person of the defendant. He is now in execution, not for the fine,

but for a certain term of imprisonment, which he is adjudged to undergo as a punishment, exclusive of the fine in question. This not the case where body and goods are taken for one and the same cause. It has been urged, that no rule of common law is to be found to this effect. I do not know where we shall find it laid down at common law, that an estate in fee is descendible to a man's heir or to the eldest son of the father; and the same may be said of many other maxims of law, which have been acted upon for ages. I know from cases which have occurred in the Court of Exchequer within a very few years, that this rule of law has been acted upon. I recollect one case that occurred, some fifteen or sixteen years since, where a large sum of money being due to the crown by a gentleman of large fortune, his person was taken, and he was imprisoned, and whilst he was in prison an inquisition was holden to inquire what lands or other property he was possessed of, in order that they might be seized into the hands of the crown. I recollect another case much more recent than that, where a person, who was imprisoned in *Manchester* under similar circumstances, made an application to the Court for his release. Indeed the writ of extent, in the terms in which it has uniformly prevailed, and still prevails, directs the sheriff to inquire what lands and tenements, goods and chattels, the defendant is possessed of, and if any, he is directed to seize them, and further he is directed to take the person of the defendant. That is the common form of the writ of extent used now. Better evidence of the law of the land cannot be very well found. It seems to me therefore that the case of the *King* v. *Wade*, in which it was ruled by the Court that though one be in execution for a fine to the King, yet a *levari facias* lies *de bonis et catallis*, is a decisive authority in the present case. It is an authority founded upon the general principle of the common law, and shews that a *levari facias*

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may issue for a fine due to the King, a fine being in fact a debt of record. I think therefore, that this writ is issuable on the principle of the common law, and I do not feel myself entitled to entertain any doubt of the legality of the proceeding. If the writ has issued improperly, or under circumstances contrary to the interests and security of the crown, so as to endanger the payment of the debt to the crown, it might be made the foundation of another application, to which our decision does not extend.

BAYLEY J. The only question we have to consider is, whether the crown has a right to issue a *levari facias* for the debt in question, and upon that point, on principle, it seems to me there can be no doubt. Indeed the question is not discussed on principle; it is not shewn in any respect to be inconsistent with legal principle. The only thing that is said is, that this is a new mode of proceeding, and that most mischievous consequences will result if such a mode of proceeding shall be adopted. I can conceive the mischievous consequences of a defendant withdrawing all his property from the effect of a judgment, and the preventing him from so doing may be attended with inconvenience to himself, but I am not aware of any mischievous consequences to the crown, or to the regular administration of justice, by this proceeding, where there is a judgment that the party do pay to the King a fine of a certain sum. By the judgment the debt becomes a debt to the King of record, and it is payable to the King *instanter*. Part of the judgment is, that if at the expiration of the period which is fixed for the imprisonment of the defendant, as another part of his sentence, the fine shall not be paid, but shall continue at that time due, then he is to remain in prison until that fine is paid. That is for a further remedy on behalf of the crown, but still it is a debt due to the crown from the

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very moment that judgment is pronounced. To say that the crown shall not be at liberty to sue out an execution for its debt, is to place the crown in a worse situation than that in which the subject stands. What is the common and ordinary course of a judgment? Why, that an execution is to issue. Then, where there is a judgment that the party do pay to the King a particular fine, the judgment makes it a debt due to the crown; but why is not the crown to be at liberty to sue out an execution? The case my Lord refers to, shews that a writ of *levari facias* was the course of proceeding adopted in that particular instance. The King has a right to proceed, in his own Court, for the purpose of recovering his fine. I take it, also, that the King has a right to choose his own Court for the purpose of suing out execution, at least, he is at liberty to adopt that Court in which the judgment is pronounced. Why, if the King's fines were to be estreated into the Court of Exchequer, could there be any doubt that the Court of Exchequer would issue the process? Then if there is no doubt of that, why is not the King at liberty to issue process out of this, which is one of his own Courts, as well as out of the Exchequer, which is another of his Courts. In *Comyn's* Digest, tit. Viscount, it is said to be a part of the duty of the sheriff himself to levy the sums which are due to the crown, if it appears upon record that they are so due. (*a*) He is to take care of all that belongs to the crown, and likewise see that the King's monies, which are due of record, shall be recovered and paid into the Exchequer. Without inquiring whether the sheriff would of himself have any such right, I can entertain no doubt that where there is a judgment of the Court, that there shall be a payment of a fine to the King by the subject, that constitutes a debt from the

(*a*) *Com.* Dig. Viscount, C. 5. "And therefore the sheriff, *ex officio*, may seize and take to the King's use the profits of all lands within his county, come to the King by descent, remainder, reverter or escheat; or by attainder for treason, petit-treason, or felony." And see *Com.* Dig. Prerogative, D. 23.

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subject to the King, and the King has a right to issue his process for the payment of it; and I see no inconvenience whatever arising from such a doctrine, in this case, because that cannot be considered as an inconvenience, which merely takes away from the party the opportunity of eluding the judgment of the Court.

HOLROYD J. I am of opinion that the rule *nisi* in this case ought not to be granted, because the determination of *The King* v. *Webb*, (a) which has been referred to, is a decisive authority for the present proceeding. The principle of it is established by that case; but I think there is no case wanting upon the subject, because the principle appears to me to be founded upon the common law. In the case of *The King* v. *Webb*, "it was ruled by the Court, that though one be in execution for a fine to the King, yet a *levari facias* lies *de bonis et catallis*, and by such writ the sheriff may take ready money; and here was cited, in *Kelygne's* time, one *Cadmore's* case, the same rule." Therefore it was held, that though the party was in execution for the fine, yet the *levari facias* goes to take his goods and chattels; and that appears to have been ruled in a case prior to the time of *The King* v. *Webb*. It appears to me to be founded upon the principle of the common law, that the King has a prerogative in that respect; it is a privilege which the subject has not, that the person being in execution for the fine, yet for the King's debt the King has a right to take the body, lands, and goods of the party, until his debt is satisfied. So that even supposing the defendant *Woolf* to be in execution for the fine, still the *levari facias* might issue against his goods and chattels; but the circumstance of his being in execution under the sentence of imprisonment makes no difference, for by the judgment of the Court

(a) 2 *Show*. 173.

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he is to be still further imprisoned until the fine be paid.

BEST J. It is a clearly established principle, that the King may have execution against the body, lands, and goods of the defendant. That is an acknowledged general principle of law, and as applied to the present case, the case of *The King* v. *Webb* is a decisive authority. I have heard nothing to impeach the authority of that case. It is said, that being decided in the time of *Charles* the Second, it is a strong argument to impeach the authority of the case. For the same reason it might be said, that the soundest law laid down by Lord *Hale* and many other enlightened Judges of that time is of no authority. This defendant is not at this moment in execution for the non-payment of the fine. He is committed for two years, and it is not until the expiration of those two years that the imprisonment begins for the non-payment of the fine. He is sentenced to pay a fine of 10,000*l.* and to be imprisoned two years. The fine becomes a debt of record to the crown, the very instant the judgment is pronounced, and it would be a very strange thing to say, that where there is a debt immediately due to the crown, there is no remedy for the recovery of it. In fact, it would be placing the crown in this situation, that the greater the delinquency the greater would be the difficulty and the danger of recovering the penalty, for the longer the imprisonment imposed upon the defendant, the greater would be the opportunity for him to remove his property, and delay the rights of the crown, and probably the fine could not be recovered at all. That seems to me to be inconsistent with common sense, and is a doctrine not to be found in any part of the law of this country. I think, that as the defendant is now confined for his offence, this is the proper and regular course of proceeding, for the purpose of recovering the fine which it has been

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thought fit to impose upon him. It seems to me, that it would have a dangerous and mischievous effect if we were to doubt upon a principle of common law. In this particular case, any doubt upon the question would be attended with much mischief, for it does not appear that the whole sum is yet levied. If the Court, by granting this motion, were thereby to throw out an intimation that there was a doubt of the propriety of executing this *levari*, it might perhaps prevent the exertions of those who are endeavouring to recover the whole sum for the crown, because any delay upon the subject, or any favour shewn to the defendant, would give him an opportunity of removing his property out of the reach of the Court, and of those who may have a claim upon it. Under these circumstances, I think the Court are bound not to grant the rule in this case.

Rule refused.

END OF EASTER TERM.

CASES

PRINCIPALLY

ON

PRACTICE AND PLEADING,

AND RELATING TO THE

OFFICE OF MAGISTRATES,

DETERMINED

IN

The Court of King's Bench,

IN

Trinity Term,

In the Fifty-ninth year of the Reign of GEORGE III.

The KING *against the* SHERIFFS *of* MIDDLESEX, *in a Cause of* COOPER *v.* JAGGER.

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Saturday, 12th June.

If a rule *nisi* has been discharged in consequence of a mistake of counsel in stating the terms of the affidavits on which it was founded, the case may be reheard in a subsequent term.

ANDREWS in the last Term obtained a rule *nisi* for setting aside an attachment, on the ground that the same had been *irregularly* obtained after notice that the defendant had been rendered.

Although added bail have been rejected, they

Chitty then opposed the rule, on the ground that rejected bail could not render, and that the affidavit on

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are competent to render; and an attachment afterwards moved for is irregular. (*a*)

which the motion was founded was defective in not complying with the rule of *Michaelmas* Term last, (*b*) requiring the affidavit to state that the application for setting aside the attachment was really and truly made on the part of the sheriff or bail at his or their own expense, and for his or their only indemnity, and it not occurring to the counsel at that time that the rule only applied to motions for setting aside an attachment *regularly* obtained, the rule *nisi* was discharged. *Andrews* now moved the Court upon an affidavit of

(*a*) The render of the defendant is equivalent to perfecting bail, *Chadwick* v. *Battye*, 3 *M.* & *S.* 283. *Harford* v. *Harris*, 4 *Taunt.* 669. and therefore it seems that the plaintiff has no reason to complain, if he has the security of the defendant's body instead of the security of the bail. It has been said, however, that if the bail do not justify at the time appointed, and no further time be given, the bail are out of Court. *Crompt.* Prac. 3d ed. 64. *Tidd*, 6th ed. 270. But it seems that in K. B. bail who have been rejected are competent to surrender their principal, while their names remain upon the bailpiece; and when one bail only had justified, and time had been refused by the Court to justify another, the Court held the render sufficient. *Anon. May* 24. *East.* 40 *Geo.* 3, K. B. 1 New Rep. 138. *a.* S. C. *Tidd*, 275. So, if on exception to bail notice be given of other bail, only one of whom justifies, and the names of the first bail still remain on the bailpiece, the first bail may surrender the principal. The King *v.* the Sheriff of *Essex*, 5 T. R. 633. in which case the master reported, that there should have been a rule to strike out the two first bail, whose names remained upon the bailpiece, and that until that was done they might surrender the principal. In C. P. the practice is different, for although in that Court any bail are in general sufficient to make a surrender, yet bail who have been rejected are considered as no bail; and although no rule has been obtained to strike their names off the bailpiece, they are incompetent to surrender the defendant. *Mills* v. *Head*, 1 New Rep. 137. And in 3 *Wils.* 59. it was laid down as a rule by the Court, that when bail above are excepted to and cannot justify themselves, they are considered as no bail, and therefore cannot render the defendant to prison; but other fresh bail may be put in, and before any exception taken to them they may render the defendant in discharge of themselves. It is clear even in C. P. that bail may render without justifying. *Hoi* v. *Walker*, 1 *Hen. Bla.* 638; *Seaver* v. *Spraggon*, 2 New Rep. 85. And in *Bell* v. *Gate*, 1 *Taunt.* 163. it was said by *Heath* J. that bail after they had been rejected might enter into a new recognizance for the purpose of making the render; and that any persons whatsoever, even if they came out of Newgate, might become bail for that purpose. See also, as to this point, *Holward* v. *Andre*, 1 *Bos.* & *Pul.* 32; *Jackson* v. *Morris*, 2 *Bla. Rep.* 1179. *Tidd*, 6th ed. 275.

(*b*) 2 *Bar.* & *Ald.* 240.

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the circumstances and of the mistake, that the attachment might be set aside.

Chitty shewed cause, and submitted that such motion could not be entertained, because the case had been once heard and disposed of, and therefore the Court would not allow the same matter to be discussed again. And he referred to the rule K. B. *Hil.* 3 *Jac.* 1. by which it is ordered, "that if any cause shall first be moved in Court in the presence of the counsel of both parties, and the Court shall then thereupon order between those parties, if the same cause shall again be moved contrary to that rule so given by the Court, then an attachment shall go against him who shall procure that motion to be made contrary to the rule of Court so first made; and that the counsel who so moves having notice of the said former rule, shall not be heard here in Court in any cause in that Term in which that cause shall be so moved contrary to the rule of Court, in form aforesaid." And he referred to *Tidd's* Prac. 6th ed. 531.

But the *Court* held, that as the rule was made absolute on the former occasion, in consequence of a misapprehension of the facts, the rule of Court did not apply.

The motion therefore being opened again, the facts disclosed on the affidavits were these:—the defendant was arrested on a *latitat*, returnable the first return of *Easter* Term. Two sets of bail, of whom the plaintiff had notice, were upon oppositions severally rejected, and the defendant was afterwards rendered by the added bail, who had been rejected, and notice of such render was given, notwithstanding which the plaintiff obtained an attachment against the sheriff. To set aside this attachment the application was made last Term,

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and the question was, whether the added bail, remaining on the bailpiece, were competent to render the defendant, after two sets of bail had been rejected, and the time for putting in bail had expired.

Chitty submitted, that under these circumstances it was not competent for the added bail to render the defendant, and referred to the practice of C. P. where bail rejected were considered incompetent to render their principal, being guilty of a species of contempt in offering themselves to justify, with the knowledge of their insufficiency. He admitted that it was laid down in the books of practice, that rejected bail might in this Court render. (*a*) But there were no reported decisions to that effect; and as the practice of the Court of C. P. was different, and in the present case bail had been twice rejected, the Court would not after so much delay, set aside the attachment. But

THE COURT said, that the practice of this Court was different from that of C. P. There was no reported case to be found in this Court which made a distinction as to the case where a defendant's bail were twice rejected. The reason for allowing added bail the privilege of rendering their principal was, that their names still remained on the bailpiece, and which would continue their responsibility. Upon the whole therefore, the rule obtained last Term ought to be made absolute in the terms prayed.

Rule absolute.

(*a*) *Tidd*, 6th ed. 275.

Monday, June 14th.

NICHOL *against* WILTON.

In an action on a bill of exchange by the payee against the acceptor,

A. *MOORE* moved for a rule to shew cause why several counts should not be struck out of the declaration in this cause, they being alleged

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to be superfluous, on an affidavit stating that the action was brought by the payee, against the acceptor of a bill of exchange for 150*l.* and that the declaration contained counts upon the bill of exchange, and counts for work and labour, with the usual money counts. The particulars of the plaintiff's demand, delivered under the usual order, merely stated that the action was brought by the plaintiff as payee, against the defendant as acceptor of a bill of exchange for 150*l.*, and did not, as usual, state that the plaintiff would resort to the other counts. Under these circumstances it was submitted, that there was no pretence

where the declaration contains special counts on the bill, with counts for work and labour and the money counts, and the particulars of demand are confined to the cause of action on the bill, the Court will not grant a rule for striking out the common counts if there be no complaint of vexation. (*a*)

(*a*) The Court will grant a rule for striking out counts which appear on the face of the declaration to be manifestly superfluous.

Where the declaration contains special counts for work and labour, besides the general counts, the special counts may be struck out on motion if they appear to be unnecessary; and the rule was made absolute with costs where plaintiff was an attorney.

Anon. Trin. T. 1816. *July* 3. *Comyn* shewed cause against a rule which had been obtained by *Andrews*, for striking out superfluous counts. The plaintiff had introduced into the declaration a special *indebitatus* count for work and labor as an accountant, with a *quantum meruit* count thereon, and two other counts for work and labour generally, with the money counts; and by the particulars of demand delivered, the action appeared to be brought for the sum of 3*l.* 3*s.*, for settling the defendant's accounts as an overseer of the poor of St. *James's, Deptford.* Lord *Ellenborough* C. J. I should not be disposed to hold this rule strictly, and to strike out counts, even if they should not be expressly shewn to be necessary: but these special counts for work and labour, and the general counts for work and labour, cannot be necessary; therefore the rule must be made absolute, and as the plaintiff is an attorney, with costs.—Rule absolute, with costs.—See also *Bowness* v. *Wilcock, Barnes*, 360; *Meeke* v. *Onlade*, 1 *New Rep.* 289; *Nicholson* v. *Croft*, 2 *Burr.* 1188; *Tidd*, 6th ed. 467; *Price* v. *Fletcher*, *Cowp.* 727; 1 *Campb.* 196; *Clarke* v. *Mumford*, 3 *Campb.* 37. But where the counts do not appear to be superfluous on the face of the declaration, the Court will not direct them to be struck out merely on the ground that the causes of action are not included in the particulars of demand.

Counts cannot be struck out of the declaration on the ground that they are superfluous, unless they appear superfluous on the face of the declaration.

Williams v. *Thompson, East.* T. 1817, *April* 28. *Chitty* moved for a rule to strike certain counts out of the declaration, on the ground that they were superfluous. Two counts were introduced for work and labour, as as well as a count for interest; and it was sworn that the plaintiff had admitted that he had no such demand against the defendant, and it was not included in the particulars delivered. Lord *Ellenborough* C. J. The counts in the declaration are not superfluous merely on the face of them, and the admission alleged to have been made might be improvident.—Rule refused.

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for introducing into the declaration the counts for work and labour, and the money counts, because the plaintiff could recover only upon the bill of exchange. All the other counts ought therefore to be struck out.

BAYLEY J. This would be going farther than we have yet done. It does not appear by the defendant's affidavit that any of the counts alleged to be superfluous were introduced for the purpose of vexation. The plaintiff had a right to insert counts on the original consideration of the bill, and though the particulars in their present form do not advert to the common counts, yet this is not such a case of vexation as to induce us to grant a Rule *Nisi*.

HOLROYD J. & BEST J. concurred.

Rule refused.

Tuesday, June 22d.

BAGLEY *against* WATKINS.

The Court will not refer a declaration to the master to strike out superfluous counts, but they will, on motion, order them to be struck out if they appear vexatious. (*a*)

THIS was an action by the payee against the drawer of a bill of exchange, and the declaration contained the usual money counts, and *Andrews* moved to refer the declaration to the master to strike out the superfluous counts, after particulars of demand had been delivered to the defendant simply stating that the action was brought upon the bill of exchange in question.

THE COURT said that this was an unusual application, and could not be sustained, because if there

(*a*) The practice has been stated to be, that when the objection is clear the Court will order the superfluous counts or matter to be expunged on motion in the first instance; but otherwise, they will refer it to the master or prothonotary, and decide upon his report. *Tidd*, 6th ed. 649. In *Price* v. *Fletcher*, *Cowp*. 727. the Court referred the declaration to the master to strike out the superfluous matter.

was ground for objecting to the declaration, the Court would themselves order the improper counts to be struck out.

F. Pollock, *Amicus Curiæ*, said that about two years since, he had made a similar application to the Court, in a case where the declaration was upon four bills of exchange, two of which had been paid, and the Court said they would not refer the declaration to the master, but that the proper course was to apply to the Court to strike out the superfluous counts if they had been unnecessarily introduced.

BAYLEY J. adopted this as the rule in these cases, and said, that if there was any reason to suppose that the counts objected to were introduced for the purpose of oppression, the Court would strike them out.

Andrews said that he had no instructions to this effect, and therefore the

Rule was refused.

The KING *against* CARLISLE.

Monday, June 14th.

An affidavit that relates to several indictments or causes must have as many stamps as there are cases to which the affidavit and motion founded thereon apply. (a)

Every copy of a libel sold by the defendant is a separate publication, and liable to a distinct prosecution: and though the defendant be prosecuted by informations filed by the attorney general, as well as by indictments on the part of a different person for publishing different copies of the same libel, the Court will not restrain the proceedings. (b)

THE defendant being charged on several informations and indictments for printing and publishing certain blasphemous libels, was brought up last term to plead thereto, when he obtained time to plead until the present Term, and on a former day he was accordingly brought up again to plead. The defendant on that occasion tendered an affidavit relating to the

(a) Vide 55 *Geo.* 3. *c.* 184. sched. part 2. "*Affidavit* to be filed, read, or used in any of the courts of law or equity at *Westminster*, or the Great Sessions in *Wales*, or of the counties palatine of *Chester*, *Lancaster*, and

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indictments and informations, written upon one stamp only, for the purpose of founding a motion thereon. But the *Court* were of opinion, that as the affidavit

Durham, or before any judge or master or other officer of any of the said courts, or before the Lord High Chancellor or the Lord Keeper or Commissioners of the Great Seal sitting in matters of bankruptcy or lunacy, 2*s*. 6*d*. Affidavit to be filed, read, or used, in any other court of law or equity in *England*, except in actions or suits where the debt or damage or thing claimed or demanded shall be under the amount or value of 40*s*., 1*s*. 6*d*." See also 48 *Geo*. 3. *c*. 149. Sched. part 2. *s*. 3. In C. P. where the affidavits in four causes were each of them entitled in all the four but there was only one stamp on each affidavit, and an objection was taken on this account, the Court held the objection fatal, but allowed the counsel to amend by striking out three of the names and forthwith reswearing the affidavits in the fourth cause, which made them good affidavits in that cause. *Anon.* 3 *Taunt*. 469. In like manner, two separate affidavits require separate stamps, though they are contained on the same paper.

Two separate affidavits on one stamp cannot be read.

Anonymous. *Hil*. T. 1815. *Jan*. 23. *Curwood* objected to the reading of an affidavit, on the ground that separate affidavits were contained on the same paper, one being indorsed on the other, and only one stamp was affixed, though the affidavits were entirely distinct. He distinguished this from the case of a *joint* affidavit by several persons: and the Court held the objection valid. But it has been determined in this Court, that an affidavit with a single stamp is sufficient to found four Rules. The *King* v. *Muller*, *Trin*. T. 1813. *July* 1st. on a *quo warranto* prosecution. With respect to agreements, it is held that where there is a community of interest between several persons in the same subject matter, one stamp is sufficient, although the several interests of different persons are combined in the same agreement. *Goodson* v. *Forbes*, 6 *Taunt*. 171; *Baker* v. *Jardine*, 13 *East*, 235, *b*; *Davis* v. *Williams*, 13 *East*, 232; *Bowen* v. *Ashley*, 1 New Rep. 274; 6 *Taunt*. 175. But where an agreement relates to several subjects, and at the same time affects the separate interests of several persons, there ought to be a separate stamp for each party against whom or in whose favour the instrument is offered in evidence. *Doe* dem. *Copley* v. *Day*, 13 *East*, 241; *Robson* v. *Hall*, *Peake's Rep*. 128; The *King* v. *Reeks*, 2 *Stra*. 716. 2 *L*. *Raym*. 1445; *Powell* v. *Edmunds*, 12 *East*, 6; *Perry* v. *Bouchier*, 4 *Campb*. 80; *Waddington* v. *Francis*, 5 *Esp*. 182. *Phil*. *Ev*. 448. See also, as to the stamp on affidavits of debt, *Gilly* v. *Lockier*, *Dougl*. 217; *Crooke* v. *Davis*, 5 *Burr*. 2691. 13 *East*, 237, *note per Buller* J.

(*b*) Even where two indictments are preferred for the same offence, the defendant cannot plead in abatement that another prosecution is depending, but one of the indictments may be quashed on motion, on the ground of insufficiency. Sir W. *Withepole's* Case, *Cro*. *Car*. 147. Lord *Raym*. 922. *Foster*, 104, 5, 6. *Dougl*. 240. *Hawk*. *B*. 2. *c*. 34. *s*. 1. *Com*. *Dig*. Indictment. L. 1 *Chitty's* Crim. Law, 446, 478.

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had reference to several indictments and informations, it could not be received unless there were as many stamps as there were cases to which the affidavit referred. The defendant was accordingly remanded until this day, when he came up with an affidavit free from the objection to which the Court had formerly adverted. The affidavit stated, that the defendant was now under prosecutions by indictment, at the instance of the Society for the Suppression of Vice, for the same description of offences as those for which informations were filed against him by the Attorney General. The defendant admitted, that the indictments preferred against him by such Society were for different publications of copies of the same libels for which he was prosecuted by the Attorney General.

THE COURT said, that there was nothing incompatible in the proceedings against him by the Attorney General and those which had been instituted by the Society for the Suppression of Vice, because every copy of the same libel sold by the defendant was a separate publication, for each of which he was liable to be prosecuted criminally.

The defendant then pleaded Not guilty, to each of the informations and indictments with respect to which he had obtained time to plead until this Term, and was informed that he would be tried at the adjourned Sittings in *London* after this Term.

MORRIS *against* HUNT.

Monday, June 14th.

ACTION of debt, by the high bailiff of *Westminster*, to recover from the defendant his third share or proportion of the expense of erecting hustings, paying poll clerks, &c. at the last general election for the city

The 53 *G.* 3. c.152. is a public act, because it relates to a branch of the legislature, and

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of *Westminster*, the defendant having been one of three candidates who had offered themselves to represent that city in Parliament. The defendant pleaded the general issue *nil debet*. At the trial before *Abbott* C. J. at the Sittings at *Westminster* after last Term, a verdict was found for the plaintiff, damages 274*l*.

therefore in an action founded on that statute at the suit of the high bailiff of *Westminster*, to recover the expenses of erecting hustings, &c. on the election of members of Parliament, it is not necessary to produce an examined copy of the act.

In such an action, it is not necessary to produce the speaker's writ to the sheriff, to shew that the election was duly held; but the sheriff's precept is sufficient—nor it it necessary for the high bailiff to prove that he has taken the oath against bribery—nor is it necessary to produce the appointment, if it be proved that he acted as high bailiff—nor is it necessary to produce the poll-book to prove defendant a candidate, if it be proved that defendant used the hustings, &c. as a candidate.—Where three candidates were liable for expenses of hustings, &c. and two of them paid a charge for which they were not liable by law; Held, that the excess above the legal payment could not be applied in favour of a third candidate against whom an action was brought. The high bailiff of *W.* cannot charge a candidate with expense of constables to keep the peace at an election; but under the head of expense of erecting hustings, he may charge for persons to watch them at night, beer to the workmen, paviour's bill for restoring the ground, and surveyor's bill. The Court will not grant a new trial on the ground that an item of charge has been allowed by the jury, which could not be recovered by law, when the sum charged amounts only to a third part of 10*s*. (*a*)

(*a*) See the Acts of Parliament 51 *Geo*. 3. *c*. 126. and 53 *Geo*. 3. *c*. 152. and the cases of *Morris* v. *Burdett*, 1 *Campb*. 218; *Morris* v. Lord *Cochrane*, 1 *M*. & *S*. 283; *Morris* v. *Burdett*, 2 *M*. & *S*. 212. The statute 23 *Hen*. 6. *c*. 9. relating to bail-bonds, is a public act, for though it relates to the duties of a particular officer, namely the sheriff, yet it concerns the general administration of justice, and confers the privilege of being bailed upon all the King's subjects; and moreover the stat. 4 and 5 *Ann*, *c*. 16. *s*. 20. which enables the sheriff to assign bonds taken under the 23 *Hen*. 6. has made the latter act a general law. *Samuel* v. *Evans*, 2 T. R. 569; *Lovell* v. the *Sheriffs* of *London*, 15 *East*, 320; see also *Rex* v. *Rawlin*, *Sid*. 209; *Buller's* Nisi Prius, 223, 4; *Bac*. Ab. Statute, J.; *Com*. Dig. Parliament R. 6 and 7. 2. By stat. 51 *Geo*. 3. *c*. 126. *s*. 4. it is enacted, that it shall be sufficient for the plaintiff in any action of debt given by *this* act to set forth in the declaration or bill that the defendant is indebted to him in the sum of ——, and to allege the particular offence for which the action or suit is brought, and that the defendant hath acted contrary to this act, without mentioning the writ of summons to Parliament, the precept thereon, or the return thereto, (and so in an indictment, &c.) and upon trial of any issue in any such action or indictment, &c. the plaintiff or prosecutor, &c. shall not be obliged to prove the writ of summons to Parliament, the precept thereon, or the return thereto, or any warrant or authority to the bailiff grounded upon any such writ of summons. Vide *King* v. *Pippett*, 1 T. R. 235, 238; *Rex* v. *Meade*, 1 *Holt*, 593; 2 *Stark*. 205, S. C. 3. Where on a *quo warranto* information against the defendant for exercising a corporate office, it was proved that the defendant had not taken the sacrament within a year after his election, according to the stat. 13 *Car*. 2. *c*. 12. and it was said in answer that it did not appear that the other party who had been elected had not been guilty of the same omission, the Court held that it

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The defendant in person now applied to the Court for a rule to shew cause why the verdict should not be set aside and a nonsuit entered, or why there should not be a new trial granted. In support of the first part of his motion, he took several objections.—*First*, that the original writ directed by the speaker of the House of Commons to the sheriff, authorizing him to hold the election, ought to have been produced, instead of the precept, upon which the plaintiff solely relied as having been directed to him by the sheriff, to hold the election as high bailiff of *Westminster*. *Secondly*, that there ought to have been an office copy of the 53 *G*. 3. *c*. 152. produced in evidence to prove the plaintiff's title to sue, inasmuch as that act of parliament must be taken to be a private act, no clause having been introduced therein to make it public. *Thirdly*, that there was no proof of the plaintiff having taken the oath against bribery and corruption required by 2 *G*. 2. *c*. 24. before he proceeded to take the poll. *Fourthly*, that the poll-book ought to have been produced, for the purpose of shewing that the defendant was a candidate at the election: and, *Fifthly*, that the plaintiff's appointment as high bailiff should have been pro-

must be presumed that he had conformed to the law. The *King* v. *Hawkins*, 10 *East*, 211; *Bennett* v. *Clough*, 1 *Barn*. and *Ald*. 461, 3; *Williams* v. *East India Company*, 3 *East*, 192. 4. On an indictment for perjury committed by the defendant before a surrogate in an ecclesiastical court, proof that the person who administered the oath acted as surrogate, has been held sufficient *prima facie* evidence of his appointment. *Rex* v. *Verelst*, 3 *Campb*. 432. So in the case of peace officers, justices of the peace, constables, &c. it is sufficient to prove that they acted in these characters, without producing their appointments. Per *Buller* J. in *Berryman* v. *Wise*, 4 T. R. 366. And see *Radford* v. *M'Intosh*, 3 T. R. 632. 5 T. R. 623. 6 *Id*. 663. 2 *Stra*. 1005. *Phil*. Ev. 180. 5. See as to the poll-books, *Mead* v. *Robinson*, *Willes*, 423 (*a*), 4. 6. In *Morris* v. Lord *Cochrane*, 1 *M*. & *S*. 283. it was held, that the candidates were not jointly liable for the expenses of the hustings, but that each candidate was severally liable for a moiety of the expenses. See *Drake* v. *Mitchell*, 3 *East*, 251. See also as to the expenses for which a candidate is liable at the election, *Morris* v. *Burdett*, 1 *Campb*. 218. 51 *Geo*. 3. *c*. 126; and as to granting a new trial, see *Turner* v. *Lewis*, *ante* 265, and notes.

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duced. The third objection was not taken at the trial. In support of the motion for a new trial, the defendant urged a misdirection of the learned Judge to the jury. It appeared at the trial, that there were certain items of charge in the plaintiff's demand, which the learned Judge was of opinion he could not recover as against any of the candidates, such as the charge for constables, &c. The other candidates at the election, Sir *Murray Maxwell* and Sir *Samuel Romilly*, had paid their respective shares of the aggregate demand made against them, including the items which the learned Judge was of opinion the plaintiff could not recover at law. The defendant contended at the trial, that these surplus payments made by the other candidates ought to go in reduction of the demand made against him in this action; but the learned Judge charged the jury, that if the high bailiff of *Westminster* had taken from the other candidates more than he ought to have received, that was a matter which only concerned those candidates, but was *res inter alios* with respect to the present defendant, and could not be set off in the present action. The defendant now contended that this was a misdirection, and that in all events he was entitled to a new trial.

ABBOTT C. J. This is an application to the Court either to set aside the verdict and enter a nonsuit, or to grant a new trial. As to the first part of the application, several objections have been taken. With respect to the second objection, namely, that the act of parliament upon which the plaintiff sues is a private one, and that consequently an office copy of it should have been produced, I think the objection is not well founded. I was of opinion at the trial, and I am still of the same opinion, that this is not a private but a public act of parliament. It relates to a branch of the legislature of the kingdom, and that is sufficient

to give it the character and operation of a public act, without the necessity of introducing a specific clause for that purpose. It has been held, that an act of parliament relating to the Prince of *Wales's* rights in the duchy of *Cornwall*, is a public act, by reason of the rank and importance of the personage to whom it relates. (*a*) By parity of reasoning, the act of parliament in question, from its nature, is a public act. It seems to me, therefore, that this objection cannot be supported. The next objection is, that there is no proof of the plaintiff having complied with the provisions of the 2 *Geo.* 2. *c.* 24. which directs, that the high bailiff, before he proceeds to take the poll, shall swear that he has not received or been promised any gift or reward for making the return. The omission to take this oath might subject the high bailiff to severe penalties for the breach of his duty, but it would not make the election void. We are not, however, to presume any person guilty of a crime, until the fact is proved. The presumption of law in cases of this kind always is, that the public officer has performed his duty. It is said here, that the plaintiff has not done his duty in taking the oath prescribed by law. The onus of proof that he has not lies upon the defendant, whose business it is to sustain his charge by evidence. In the absence of all proof upon this point, we are not to presume that the plaintiff has been guilty of a crime. Another objection made is, that the writ to the sheriff ought to have been produced, in order to shew that the election was duly made. I thought at the trial, and I still think, that that was not necessary. It has been held in an action brought upon the statutes of bribery, that in order to prove an election in a borough it is not necessary to produce the original writ to the sheriff, it being sufficient to prove the sheriff's precept to

(*a*) The Prince's Case, 8 *Co.* 28 b.

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the mayor or bailiff.(a) That is a very reasonable proposition, which ought to prevail, especially against a gentleman who is proved to have been a candidate at the election, and who acted throughout in a conspicuous manner. I am of opinion, however, that proof of the precept from the sheriff to the high bailiff was sufficient proof that the election was duly held. The fourth objection is, that the poll-books ought to have been produced for the purpose of shewing who were the candidates at the election. I was of opinion at the trial, and I am still of the same opinion, that they need not have been produced, because I think that they were not only not the best evidence of the fact of the defendant being a candidate, but they were hardly any evidence at all. It was contended at the trial, on the part of the defendant, that in order to shew that he was a candidate within the meaning of the act of parliament, for the purpose of making him chargeable to the expense of the election, these books should have been produced; but for that purpose I think they were not necessary. If it had been suggested then, that the poll-books ought to have been produced, in order to shew that the poll had been duly and accurately taken, the objection would have assumed a different form; but without saying what effect it would have, I think the defendant is not now at liberty to avail himself of it, after the verdict has passed against him, in applying for a new trial. If the defendant were now to be allowed to take advantage of this objection, it would have this effect, that a defendant might purposely abstain from taking an objection which he might make at the trial, and then, after the trial was over, come to the Court and obtain a new trial, thereby casting upon the plaintiff unnecessary expenses. It appears to me, therefore,

(a) Vide *Mead* v. *Robinson*, *Willes*, 426.

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that if the defendant meant to take advantage of the objection in this form, he should have taken it at the trial. With respect to the other part of the defendant's motion, namely, for a new trial, I am also of opinion that no sufficient ground has been made out for disturbing the verdict. The defendant at the trial took several exceptions to some of the items in the plaintiff's account, for which he contended that he was not liable; I recollect in particular, that he objected to the charge made for wages, paid to persons employed to take care of the hustings during the night. I recollect also that he objected to a charge for beer given to the workmen employed in erecting the hustings. It appeared to me that the expense of watching the hustings during the night, fairly and reasonably fell within the head of expense of erecting the hustings; for if they were not watched during the night, it is most probable that they would have been pulled down before the morning. I thought also that the charge made for beer given to the workmen could not be withdrawn from the consideration of the jury, as that charge was in effect part of the wages of the workmen. I also thought that the paviour's bill might be fairly included in the charge for erecting the hustings. There were other items, such as the charge for constables, which ought not to form any part of the charge against the defendant, because it was a necessary part of the plaintiff's duty to employ constables to keep the peace. Under these circumstances I left three questions for the consideration of the jury: first, whether in point of fact the defendant was a candidate at the election; secondly, supposing they found that the defendant was in fact a candidate, how many persons were candidates, because upon that would depend the amount of damages for which the defendant would be liable; and thirdly, I told them that the defendant ought not to be prejudiced by any payments

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made by other candidates, but on the contrary he had a right to object to any items in the account which were objectionable. At the same time however I told them, on the other hand, that the defendant ought not to have the benefit of any payments which the other candidates might have made, in respect of items for which they were not liable at law; because it must be considered that those payments were not made for his benefit, but for the benefit of all the parties; for although he was not to be prejudiced or concluded by their payment, yet at the same time he was not entitled to any benefit, in respect of matters for which by law the other candidates were not liable. As to the charge for the hustings, I left it with them to say what reasonable sum ought to be allowed, stating to them my opinion, that under that head ought to be included the charge for watching the hustings, the charge for beer, the paviour's bill, the surveyor's bill, and other small items incidentally connected with the expense of the hustings. If there was any thing wrong in my direction to the jury, or if my learned brothers shall be of opinion that I ought not to have left the question to the extent I have mentioned, then the defendant will be entitled to a new trial.

BAYLEY J. I am clearly of opinion, that there is no ground made out in this case for entering a nonsuit, neither is there any for granting a new trial. As to the first objection in support of the motion for a nonsuit, namely, that the act of parliament upon which the plaintiff declares is not a public but a private act, I am of opinion that it has no foundation. This is not an act of parliament passed for the benefit of a particular private individual, but is one in which the whole kingdom is interested, as well as interested in the question which has now arisen upon it. The act, neither in the preamble nor the title, purports to be framed on

the foundation of a petition of the high bailiff of *Westminster*, for his individual benefit, but its very title shews that it is of importance to the whole kingdom, for it is "An act to continue until the 1st day of *January* 1819; an act made in the 51st year of his present Majesty, to explain and amend the laws *touching the election of knights of the shire to serve in parliament for* England, *respecting the expenses of hustings and poll clerks,* so far as regards the city of *Westminster.*" It seems to me that the qualification introduced in this act of parliament, with a view to the candidates for the particular place for which it is framed, makes no difference in the question of its being a public act, inasmuch as it relates to a branch of the legislature in which the whole kingdom is interested. Then upon the question whether the poll-book should have been produced or not, in order to ascertain whether the defendant was a candidate, it appears to me that it was not necessary; for in the case of *Morris* v. *Burdett,* (*a*) had the poll-book been produced, it would not have proved that the defendant was a candidate within the meaning of this act. The question of the defendant's liability here depended upon the fact, which was distinctly proved, of his having actually used the hustings during the election. As to the objection that the sheriff's writ was not produced, there appears to me to be nothing in it. It is quite sufficient, in order to prove that an election has taken place in a borough, to shew that there was a precept from the sheriff, commanding the returning officer to proceed to the election. The returning officer has no right to dispute whether the sheriff has a right or not to issue his precept. In point of practice, the production of the precept is quite sufficient to shew that the subordinate returning officer had a right to hold the election. As to the objection that the high bailiff's

(*a*) 2 *M.* & *S.* 212.

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appointment was not produced, it appears to me that its production was not necessary. It is quite unnecessary to produce the high bailiff's appointment, for it is sufficient in every case of a public officer, even of the highest authority, to shew that he had from time to time acted in the situation. In the case of a justice of the peace, it is not necessary to produce his commission, it being sufficient to prove that in point of fact he acted as a justice of the peace. It is then said, that the high bailiff should have proved that he had taken the oath against bribery and corruption; the act of 2 *G.* 2. *c.* 24, is only directory, and even supposing it to have been proved that the plaintiff had not taken the oath, that would not vacate the election, but only subject him to punishment. The law presumes that a public officer does that which is legal, until the contrary is shewn. The case of *Williams* v. The *East India Company*, (*a*) amongst many other authorities to the same effect, establishes this proposition. The objections therefore in support of the nonsuit are thus disposed of. As to the question whether there should be a new trial, the objection seems to me to be, that inasmuch as the sum of 624*l.* which has been paid by the other two candidates out of the sum of 823*l.* the original demand against the three, and therefore the balance between 823*l.* and 624*l.* being 199*l.* is all that could be recovered from the defendant. The answer to that objection is, that the defendant was liable for one third of 823*l.* and that no part of that sum was intended to be paid by the other candidates for and on behalf of the defendant, but those sums were respectively paid by them on their own account to the high bailiff, who made a distinct charge, and claimed 312*l.* from each of those candidates respectively, each having separately paid his third

(*a*) 3 *E. R.* 192.

part. If they have paid more than by law they were bound to pay, that is a matter between the high bailiff and them; it is *res inter alios*, with respect to the present defendant. I am of opinion, that the items of charge objected to by the defendant are such as may be recovered by the plaintiff under this act of parliament, as being incidental to and connected with the expense of erecting the hustings. It appears that there is a charge of ten shillings made for cleaning the portico and steps of the Church. That would make about 3*s*. 4*d*. to each of the three candidates. Whether that is an item that might lawfully be charged, I shall not decide; but assuming it to be unlawful, it does not seem to me that it would be a sufficient ground for granting a new trial, and I am not aware of any authority that would authorise us in granting a new trial upon such an objection. It appears to me to fall within the rule of law *de minimis non curat lex*. As to the other items of expence, I am of opinion that the jury were correctly charged by my Lord; and for these reasons, it appears to me there is no ground made out for entering a nonsuit or granting a new trial.

HOLROYD J. and BEST J. concurred.

Rule refused.

THURLT *against* FABER.

Thursday, June 17th.

Affidavit made in this country to verify the handwriting of the *British* vice-consul, before whom an affidavit of debt was made abroad, must contain the addition of the deponent, and the defendant's obtaining a *habeas corpus* does not aid the omission. *Semble*, that an affidavit of debt made before a *British* vice-consul abroad, in the absence of the consul, is sufficient to hold a defendant to bail. (*a*)

CURWOOD on a former day obtained a rule, calling on the plaintiff to shew cause why the defendant should not be discharged out of custody on filing

(*a*) By rule K. B. *Mich.* 15 *Car.* 2. it is ordered that the true place of and true addition of *every person who shall make affidavit* in Court shall be inserted in such affidavit. *Tidd*, 6th ed. 181, 2. See also

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common bail, on two grounds. First, that the affidavit of debt, which was sworn at *Paris* before the *British* vice-consul, did not state that it was sworn before a competent authority; and secondly, that the affidavit

the cases 1 *East*, 18. 330. *Vaissier* v. *Alderson*, 3 *M. & S.* 165. *Holcompt* v. *Lumpkin*, MSS. There is no such rule in C. P. *Anon.* 6 *Taunt.* 73. It has been held a sufficient compliance with the rule, in an affidavit made by a clerk, that he was described as clerk to his employer, whose address was stated.

In an affidavit to hold to bail the residence of a clerk may be described to be as that of his employer.

Anon. Mich. T. 1814. *Nov.* 26. *Espinasse* moved for a rule to shew cause why the defendant should not be discharged out of custody on filing common bail, on the ground that the affidavit to hold to bail, which was made by a clerk, did not state the residence of the deponent, but only that of his employer. *Bayley* J. thought the affidavit sufficient in this respect, and intimated that the same doctrine had been held before. The object of requiring the addition to be stated is, that it may be known where the deponent is to be found. *Per Curiam.* Rule refused. See *Haslop* v. *Thorne*, 1 *M. & S.* 103.

In general, an affidavit made abroad for the purpose of holding a defendant to bail ought to contain all the requisites that are essential to affidavits for holding to bail in *England;* and therefore it was deemed necessary to state, in an affidavit made in *Ireland* for the purpose of arresting the defendant in this country, that he had not made a tender of the money in bank notes. *Nesbitt* v. *Pym*, 7 T. R. 376, note. *Stewart* v. *Smith*, 1 *Bos. & Pul.* 133. *Tidd*, 6th ed. 184.

Respecting the officer before whom affidavits made abroad are to be sworn, it has been holden, that an affidavit of the due execution of a warrant of attorney, and sworn before a Justice of the Peace at *Edinburgh*, is insufficient for entering up judgment on an old warrant of attorney: it should have been sworn before a Lord of Session. *Knight* v. *Hennell.* *Sinclair* v. *Rentout.* *Tidd*, 579. In *Dalmer* v. *Barnard*, 7 T. R. 251. a rule was obtained on an affidavit purporting to have been taken before a person who stiled himself high bailiff and chief magistrate of the district of *Douglas* in the Isle of *Man*, and on another affidavit made in this Court by another person who swore that he had seen the high bailiff and chief magistrate write, and that he verily believed the writing subscribed was his proper hand writing. In *Omeally* v. *Newell*, 8 *East*, 364. the affidavit to hold to bail was made at *Paris* before a person of the name of *Bonomee*, who verified the affidavit in this manner: "Sworn at *Paris* on (a certain day) before me, notary public magistrate competent in this behalf, and duly authorized by the laws of *France* to administer oaths and take affidavits. Signed *D. F. C. Bonomee.*" And the signature of *Bonomee*, and that he was a magistrate of *France* authorized to administer oaths and take affidavits, were verified by a proper affidavit sworn here. In *Voght* v. *Elgin*, temp. Lord *Kenyon*, the defendant was held to bail on an affidavit made before the proctor of *Hamburgh*, his signature and authority to administer an oath being also verified by affidavit made in this country. 8 *East*, 372.

of Mr. *Morier* the chief consul, verifying the handwriting of the vice-consul, was informal, inasmuch as there was no addition to his name.

Gaselee now shewed cause, and with respect to the first point, referred to *Beawes' Lex Mercatoria*, (*b*) to show that *British* consuls abroad are authorised to take affidavits of debt, and that during their absence the vice-consuls are vested with the same power. He produced an affidavit made by Mr. *Morier*, stating that this power was exercised by and vested in the vice-consul at *Paris*. He urged, as a preliminary objection to the present application, that the defendant should have protested against the legality of his arrest in the first instance, and that by suffering that opportunity to pass, and having caused himself to be removed to *London* by *habeas corpus*, he had acknowledged the validity of the plaintiff's proceeding. But upon this point

THE COURT were of opinion that the defendant's removing himself by *habeas corpus* did not affect his right to question the legality of his confinement, that being only a step towards bringing the matter fairly to issue. With respect to the other objections, the Court asked *Curwood* what he had to say with respect to the authority which appeared to be vested in vice-consuls to take affidavits of debt? and the learned counsel then said he would waive all consideration upon that point, and confine himself to the want of addition to the name of Mr. *Morier*, whose affidavit was simply entitled "*David Richard Morier* of 37 *Argyll Street*," without any other words of description.

(*b*) *Beawes*, 6th ed. 421, &c. As to affidavits made abroad, see *Tidd*, 6th ed. 184. 1 *Sell. Prac.* 1st ed. 110, 1.

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THURLY *against* FABER.

Gaselee, contrà, submitted that the known official character of Mr. *Morier* was sufficient.

THE COURT, however, held that the necessity of an addition to the names of persons making affidavits had been long established; and as this had been omitted in the affidavit which verified the hand-writing of the vice consul, the defendant was entitled to his discharge.

Rule absolute.

Monday, June 21st

The BANK OF ENGLAND *against* ATKINS.

The rule absolute for computing principal and interest on a bill of exchange must in this Court be served on defendant before final judgment can be signed. (*a*)

PARK on a former day moved to set aside the judgment in this case for irregularity, the rule absolute for computing principal and interest on the

(*a*) See *Dawson* v. *Sladford*, post 468; see also *Clarke* v. *Wood*, 25th *May*, *East.* T. 1816.

A rule absolute to compute principal and interest on a bill of exchange must be served.

Curwood shewed cause against a rule which had been obtained by *Andrews*, to set aside a judgment on a promissory note, on the ground that there had been no service of the rule absolute to compute principal and interest, and he relied on the case of *Sellers* v. *Tufton*, *Hil.* 1813, which he said was precisely the same case. But the master read a note of that case, by which it appeared that there was only a want of the *notice* of computation. And *Le Blanc* said the rule *nisi* and rule absolute to refer to the master, must both be served, but there need not be any notice of the taxing. If the defendant wish it, he must take care to obtain a rule to be present. The *Court* held that the rule absolute ought to have been served; and the rule for setting aside the proceedings was made absolute accordingly. *Farner* v. *Wood*, *East*, T. 1816, S. P.

The service of a rule *nisi* to compute principal and interest on a bill of exchange on one of two defendants, is insufficient.

With respect to the *mode of service*, it has been determined, that where there are two defendants, service of the rule to compute should be made on both. *Flindt* v. *Bignell* and another, 21st *Nov. Mich.* T. 1815. In this case, on a motion made by *Cross*, it appeared that service of the rule *nisi* to compute principal and interest had been made on one only of two defendants, and *Le Blanc* J. said it was insufficient; but on the service of the rule *nisi*, it is sufficient that a copy of the rule has been served, and it is not necessary that the original rule should be shown.

It is not necessary (unless where a party is to be brought

Belairs v. *Poultney*, 12th *May*, *East.* T. 1817. *Walford* moved to make a rule absolute for computing principal and interest. The affidavit did not state that the original rule was shewn to the defendant. He referred to *Tidd's*

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bill of exchange upon which the action was brought, not having been served upon the defendant before final judgment had been signed. The rule in question was made absolute on the 24th of *May*, and on the 25th judgment was signed, and since then the defendant had brought a writ of error, the affidavit not disclosing when it was brought.

Denman now shewed cause, and submitted that this was no irregularity according to the practice of this Court. He admitted that it was otherwise in the Court of Common Pleas.

(into contempt) to shew the original rule, when the copy of it was served.

Practice, 525, where the distinction was taken between the practice of this Court and the Common Pleas: "In the K. B. it does not seem to be necessary to shew the original at the time of the service, (*Vide dictum contrà*, 2 *Stra.* 877.) but in the C. P. it is reported to have been holden by the Court, in *Wye* v. *Wright*, *Barnes*, 403. that in order to make a perfect service of a rule, the original rule must be sworn to have been shown to the party at the time of serving the copy. The Court said, they would not alter the established practice of this Court, which seemed to be founded on convenience; and after much consideration and a reference to the forms of affidavits (*Tidd*, App. 4th ed. 175, 146), the rule was made absolute. The last two cases, in pointing out the manner in which the service must be made, are also important to show the necessity of service; inasmuch as these questions could never have arisen, if service of the rule had been altogether unnecessary.

No notice is necessary in K. B. previously to the computing principal and interest on a bill of exchange, but *aliter* in C. P.

It is observable however, that provided the rule to compute be duly served, no *notice* of the computing is necessary in K. B. although it is otherwise in C. P. *Anon. Feb.* 3. *Hil.* T. 1816. *Taunton* moved to set aside a judgment on a promissory note, no notice having been given of the computing principal and interest, and cited *Braming* v. *Patterson*. 4 *Taunt.* 487. in which it was held, that a proceeding by reference to the prothonotary was substituted for a writ of enquiry, and as it was necessary that notice should be given of the execution of a writ of enquiry, so it was necessary to give notice to the defendant of the prothonotary's appointment to compute principal and interest, in order that the defendant might have the opportunity of bringing forward any facts which had occurred to reduce the sum which the plaintiff had a right to recover.

BAYLEY J. The practice of this Court is otherwise, and the master says, there is no notice necessary here. When the party is served with the rule, he knows what is the necessary consequence of it. If a notice was necessary, the defendant would always keep out of the way. Rule refused. See also *Sellers* v. *Tufton*, cited in *Clarke* v. *Wood*, *supra*. It seems however that the defendant must be served with a rule to be present at the taxation of costs; *per Bayley* J. in *Dawson* v. *Sladford*, next

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Park, in support of the rule, was stopped by

The COURT. The defendant must be served with the rule absolute before judgment is signed, because he may be able to pay the debt before further costs are incurred.

Rule absolute, with costs.

Saturday, June 26th.

DAWSON *against* SLADFORD.

After judgment by default, the Judge's order for a reference to compute, &c. must be served on defendant; and though he paid part and gave a bill for the remainder on being taken in execution, the Court set aside the proceeding on the terms of bringing no action against the plaintiff. The defendant must be served with a rule to compute, and also with the rule to be present at the taxation of costs. (a)

GURNEY on a former day obtained a rule calling on the plaintiff to shew cause why the judgment and execution should not be set aside for irregularity. The defendant had suffered judgment to go by default, and after the master had computed the principal debt and taxed the costs the defendant was taken in execution, upon which he paid 10*l.* in cash, and gave his acceptance for 30*l.* being the amount of the remainder of the debt and costs, and was then liberated. The irregularity complained of was, that the order for the reference to the master was not served upon the defendant, so that he might be present at the taxation of costs.

Scarlett now shewed cause, and contended that this

(a) In the case of the Bank of *England* v. *Atkins*, ante, *June* 21st, page 466, it was held, that the rule absolute for computing principal and interest on a bill of exchange must be served on the defendant before judgment can be signed: and see the cases in the note, *Clark* v. *Wood*, *Flindt* v. *Bignell*, and *Anonymous*. A payment made under an arrest will not operate as a waver of the irregularity of proceedings. In *Norton* v. *Danvers*, 7 T. R. 375. it was held, that if a defendant on being informed that a bailable writ has been issued against him voluntarily give a bail-bond, he cannot afterwards object to the insufficiency of the affidavit to hold to bail: but Lord *Kenyon* said, that if the defendant had been actually under arrest at the time, his consent to give a bail-bond would not have been binding on him, because it might be considered as given under duress; but in that case he had voluntarily given the bail-bond.

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was no irregularity. He understood the usual course in these cases was, not to serve the defendant with the rule for referring it to the master, and for this reason, that the moment an order is made by a Judge for that purpose, if the defendant wishes to be present at the taxation, he himself takes out a rule for that purpose. [BAYLEY J. There are two different things to be done in these cases, where the defendant suffers judgment to go by default. In the first place, the plaintiff's attorney gets the rule, or Judge's order for referring it to the master. He then serves that rule or order upon the defendant, (*a*) and he afterwards gets an appointment from the master for the taxation of costs. He then serves the defendant with a rule to be present at the taxation, (*b*) in order that he may be aware at what time the appointment is made. Although the defendant has notice of the order for referring it to the master, yet he is not thereby informed at what period the master will tax the costs, and consequently, does not know at what time he is to be present. Therefore it appears to me that the defendant should be served with a rule to be present at the taxation of costs. I think it is not long since that the Court held that you must serve the rule to be present at the taxation, but that you are not bound to serve the copy of the

(*a*) The Bank of *England* v. *Atkins*, ante 466; and notes, *Clarke* v. *Wood*, *Flindt* v. *Bignell*, *ib.*

(*b*) The rule of Court for a reference to the master is as follows.— "On or (next after) —— *B.* v. *D.* Upon reading the rule made in this cause on —— next after —— in this Term, the affidavit of *E. F.* and no cause being shewn to the contrary, it is ordered that it be referred to the master to see what is due for principal and interest on the bill of exchange (or promissory note, &c.) on which this action is brought, and also to tax the plaintiff his costs, and that the said plaintiff be at liberty to sign final judgment thereon without executing a writ of enquiry of damages. Upon the motion of Mr. ——. By the Court." It is usual on the taxation of costs to give notice to the opposite attorney of the time when the costs are intended to be taxed, and in order to enforce it there must be a side bar rule to be present at taxing costs. *Tidd*, 6th ed. 1025.

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master's appointment for the taxation. (a)] If this were so, it must be admitted that the plaintiff was irregular in not serving the rule for the taxation of costs; but then it is quite clear that the defendant never meant to interfere about the matter, for he never took out any rule to be present at the taxation of costs, but on the contrary, when taken into custody, he made the proposition already referred to, to which the plaintiff acceded; and therefore it was submitted that he was now too late in this application.

Gurney, in support of the rule, insisted that the plaintiff was clearly irregular, but admitted that the defendant ought to be restrained from bringing any action for false imprisonment. The fact was, that the plaintiff had obtained a Judge's order for referring it to the master at 12 o'clock, and before one taxed his costs; at 6 o'clock the defendant was taken in execution, and at ten o'clock at night the rule to be present at the taxation was served.

ABBOTT C. J. I am very unwilling to consider that an act done by a prisoner in order to obtain his liberty, is a waver of his right afterwards to contest the legality of his imprisonment. I therefore think, that what is said by the plaintiff's counsel is sufficient ground for making this rule absolute, but upon the condition that the defendant shall not bring any action against the plaintiff or his attorney.

Rule absolute with costs.

(a) See *Anon. Hil.* T. 1816, *Feb.* 3, cited in note to Bank of *England* v. *Atkins*, ante 466, where it was held that no *notice* was necessary of the *computing* principal and interest.

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Monday, June 21st.

JAMES *against* RAGGETT.

An action being brought for two sums of money, one of which (with costs) defendant offered to pay, which offer was refused, and then the money was paid into Court, and plaintiff took it out, finding that he could not support the other part of his demand, the Court granted a rule for the defendant to set off his costs incurred after the offer to pay the smaller sum and costs, against the plaintiff's costs up to that time. (a)

CHITTY on a former day obtained a rule calling on the plaintiff to shew cause "why it should not be referred to the master, to tax the plaintiff his costs of this cause, up to and including the eighth day of *May*, and why he should not tax the defendant's costs subsequent to that day, and why when such costs were taxed the plaintiff's costs should not be deducted from the amount of the defendant's costs, and why the plaintiff should not pay the defendant his balance of such costs, and the costs of this application to be also taxed by the master, and why in the mean time all proceedings should not be stayed."

The plaintiff brought an action against the defendant for two distinct demands, one for a sum of

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(a) In the case of *Burmester* v. *Hilch*, 13 *East*. 551. the Court refused a rule to permit the defendant to pay into court the debt and costs up to a certain day after the action brought (thereby excluding the costs of the declaration delivered) upon the ground of an offer to pay the debt and costs up to that period, without having made a tender before action brought, or obtaining the common rule for staying proceedings on payment of the debt and costs up to the time of the application. And *Le Blanc* J. observed, that "such a practice would introduce great uncertainty and vexation to the plaintiff. After an action brought, a sum might be tendered to the plaintiff's agent in town, who would not perhaps be apprised of the exact state of his client's demand in the country, and then he must either stay his proceedings till he could be satisfied of it, which in many cases might answer the defendant's purpose of delay, or he must proceed at the peril of losing his subsequent costs by an application of this kind; and therefore without a strong case made out to shew an intentional vexation and view to enhance expence on the part of the plaintiff, there seems to be no ground for an application of this kind." However in C. P. where the conduct of the plaintiff appears to have been vexatious, and the defendant has been prevented from making a legal tender, and after action brought, and before declaration, offers to pay the debt and costs, and the plaintiff refuses to receive it, the Court will permit the defendant to pay the debt into Court, with costs of the action up to the time of the tender. *Zeevin* v. *Cowell*, 2 *Taunt*. 203; *Roberts* v. *Lambert*, *ib*. 283; *Gibbon* v. *Copeman*, 1 *Marsh*. 392; 5 *Taunt*. 40; *Sawbridge* v. *Conwell*, 4 *Taunt*. 255; *Last* v. *Benton*, 2 *Marsh*. 478; see the cases and observations. *Tidd*, 6th ed. 655.

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James *against* Raggett.

3*l*. 17*s*. 6*d*. the balance upon a cash banking account, and the other for a sum of 50*l*. claimed for interest on money left in the hands of the defendants as country bankers. The defendant's attorney had taken out a summons before a judge to stay the proceedings on paying the debt and costs, having previously called upon the plaintiff's attorney to know what the sum was, and having ascertained from the clerk, who looked into his precept book, that the only claim was 3*l*. 17*s*. 6*d*. The plaintiff's attorney however refused his consent to stay the proceedings upon payment of this demand. Another summons was afterwards taken out for the same purpose, but with similar success, and the plaintiff's attorney proceeded in the action and delivered a declaration for the whole sum. The defendant's attorney then paid the smaller demand into court, and the plaintiff's attorney having afterwards discovered that he had not sufficient legal evidence to sustain the demand of 50*l*. for interest, made an offer to the defendant to take the 3*l*. 17*s*. 6*d*. out of court and stay the proceedings upon payment of all the costs in the action. This was refused by the defendant's attorney, and under these circumstances the rule was prayed in the terms above mentioned, and the cases in 1 *Burr*. 578, and *Tidd's* Prac. 6th ed. 655, were cited.

Comyn now shewed cause, and said he believed that this application was without precedent. He submitted that it was competent for a plaintiff, under circumstances like the present, to abandon a part of his demand without forfeiting the costs to which he would be entitled in the action for the remainder of the demand. He was not bound to go on with the action at the risk of being obliged to pay the defendant's costs, the latter having thought proper to pay the smaller demand into Court. The effect of the present rule, if it was made absolute, would be to make the plain-

tiff pay more costs than he would be obliged to pay even if he were nonsuited.

Chitty, in support of the rule, was stopped by the Court.

PER CURIAM. This seems a very reasonable application. The plaintiff had the offer of 3*l.* 17*s.* 6*d.* and all the costs up to a certain period of time. A summons is taken out for that purpose, but the plaintiff insists upon having the whole of his demand, 53*l.* 17*s.* 6*d.*; this is refused: and then he goes on with his action, further expense is incurred, and after he has taken the smaller sum out of court, he discovers that he has no evidence to support the demand for 50*l.* Upon which he desires to stay the proceedings, upon the defendant's paying the costs. We think his offer comes too late, and that it is but reasonable the defendant should be at liberty to set off the costs he has incurred since the refusal of his offer against those of the plaintiff up to the 8th of *May*, when the summons was taken out.

Rule absolute.

WOOD *against* SILLETO.

Monday, June 1st.

The 4th sect. of stat. 43 *G.* 3. *c.* 46. providing, "That in actions on judgments recovered, the plaintiff shall not be entitled to costs, unless by the order of the Court or some Judge thereof," does not entitle a defendant to stay the proceedings on

WALFORD on a former day obtained a rule calling on the plaintiff to shew cause why the defendant should not be at liberty to pay the sum of 1006*l.* into Court, the amount of the debt in this case without costs; and why, upon such payment, all further proceedings should not be stayed and satisfaction entered on the Roll, under the following circumstances:—this was an action of debt upon a judgment for the sum of 1006*l.* which was composed partly of an original demand *bearing interest*, under an agree-

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Wood *against* Silleto.

payment of the debt, without costs, where there was probable ground for the plaintiff's also claiming interest on part of the debt.

ment between the parties, and the remainder, of money due upon simple contract. The defendant was willing to pay the sum thus mentioned, but the plaintiff refused to accept it without interest, upon that part of the demand in respect of which interest was payable. The question was, whether, under these circumstances, the defendant was at liberty to pay the money into court, without costs, under the 43 *Geo.* 3. c. 46. *s.* 4.

Denman now appeared to shew cause, and, upon stating the facts of the case, was stopped by the Court.

Walford, in support of his rule, contended, first, that according to the construction of the 4th section of 43 *G.* 3. the defendant was at liberty to pay the money into Court without costs; and secondly, that the plaintiff was not entitled to any interest whatever upon the judgment; submitting, that as he was not entitled to interest upon the whole, he could not recover it for a part of the debt. With respect to the first point, it was enacted by the statute, "That in all actions which shall be brought upon any judgment recovered, or which shall be recovered in any Court in *England* or *Ireland*, the plaintiff or plaintiffs in such action on the judgment shall not recover or be entitled to any costs of suit, unless the Court in which such action on the judgment shall be brought, or some Judge of the same Court shall otherwise order." Under the authority of this section, the defendant was at liberty to pay the money without costs, provided there were circumstances in the case to induce the Court to make such an order. Here the circumstances were such as to entitle the defendant to this benefit. On the second point he referred to the case of *Lee* v. *Lingard*, (*a*) and to *Blackmore* v. *Flemyng*. (*b*)

(*a*) 1 *East*. 401. (*b*) 7 *T. R.* 446.

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Per Curiam. With respect to the first ground of this application, there appears to be no authority. The 4th section of the 43 *G.* 3. *c.* 46. is not compulsory on the Court, the words being, "Unless the Court shall otherwise order." The circumstances at present disclosed afford no ground for making such an order. With respect to the second point, it is said, that because the plaintiff is not entitled to interest on the whole of the debt, he is not entitled to interest on part. There is no rule of law that we are aware of to support this proposition. In the case of *Lee* v. *Lingard*, which has been cited, it does not appear that the plaintiff was entitled to go for interest; but here there is an express agreement for interest on part of the debt. The case of *Blackmore* v. *Flemyng* is no authority upon this question. Unless there is some general rule established, the Court cannot see how it can accede to this motion, because if it were so to do, it would exclude the consideration of the question, whether the plaintiff is or is not entitled to interest. The effect of making this rule absolute would be to preclude all discussion, whereas by discharging it, we do not preclude the discussion, if there is any reasonable ground laid before the Court to satisfy them that the plaintiff has no right to interest on part of the sum. If the defendant were allowed to pay this money into Court without costs, that would not relieve him ultimately from the payment of costs, if the plaintiff should recover a verdict. The defendant, if he chooses, may pay the money into Court, upon paying the costs of this application, and the interest due on part of the demand, and wait the event of the cause; but thinking that the question of interest is premature, we are of opinion that it is better on the whole to discharge this rule without costs, directing that the costs of this application shall be costs in the cause.

Rule discharged accordingly.

1819.

Tuesday, June 22d.

THE KING *against* THE SHERIFF OF CHESTER.

After an action brought against the sheriff of *Chester* for not levying under a writ issued out of the Court of Great Session, the Court refused to grant a rule for the sheriff to give the plaintiff inspection of the writ in order to frame the declaration, although the writ was in the sheriff's possession. (*a*)

THIS was an action against the late sheriff of *Chester*, for neglecting to levy under a writ issuing from the Court of Great Session at *Chester*.

(*a*) See *Welch* v. *Richards*; *Street* v. *Brown*, 6 *Taunt.* 302; *Bateman* v. *Phillips*, 4 *Taunt.* 157; *Blakey* v. *Porter*, 1 *Taunt.* 386; *Willett* v. *Sparrow*, 6 *Taunt.* 576. This rule was refused on two grounds, namely, first, that the plaintiff had omitted to take the proper measures for obtaining the writ, by ruling the sheriff to return it in the Court of Great Session; and secondly, that it would be the means of obliging the sheriff to furnish evidence against himself. So the Court will not on motion of the defendant compel the sheriff to give a specific return of the particulars and proceeds of goods sold under a *fieri facias*, on the ground that his officer has wasted the goods. *Willett* v. *Sparrow*, 2 *Marsh.* 293. But in *Wilson* v. *Rogers*, 2 *Stra.* 1242. where the plaintiff had been sued in the Court of Conscience in *London*, and was taken in execution, for which he brought an action of trespass, the Court granted a rule for the plaintiff to be at liberty to inspect the book of the proceedings, so far as related to the cause against himself, on the ground that every man had a right to look into the proceedings to which he was a party. So in an action for a malicious prosecution, where it was necessary in order to support the action that the plaintiff should be put in possession of the contents of the examinations before the justices, and of the warrant on which he was apprehended, the Court granted a rule that they might be inspected and copies taken, and the originals produced on the trial. *Welch* v. *Richards*, *Barnes*, 468—9; the *King* v. *Smith*, 1 *Stra.* 126; but see 1 *Chitty*, Cr. L. 88, 9. And it is a general rule, that a party has a right to inspect and take copies of such books, &c. as are of a public nature, so as they be material to the suit, and the party in possession be not obliged to furnish evidence against himself in a criminal prosecution. *Tidd*, 6th ed. 625. Although the books of a corporation are public books, and may be inspected by a member of the corporation, when his interests are at stake, yet when a dispute takes place between a corporation and an individual who is no member of it, as when a corporation sues a stranger for tolls, the corporation being as to him the same as a private person, a court of justice will not grant an inspection of the books, in order to enable the party to find evidence against the body with whom he is contending, any more than they would to inspect private title deeds, if the dispute existed between two individuals. The Mayor, &c. of *Southampton* v. *Graves*, 8 T. R. 590; see *Rex* v. *Hollister*, *Hardw.* Rep. 245; *Rex* v. Fraternity of Hostmen in *Newcastle-upon-Tyne*, 2 *Stra.* 1223; and see *Street* v. *Brown*, 6 *Taunt.* 302; *Bateman* v. *Phillips*, 4 *Taunt.* 157; *Blakey* v. *Porter*, 1 *Taunt.* 386; *Willett* v. *Sparrow*, 6 *Taunt.* 576.

1819.

THE KING *against* THE SHERIFF OF CHESTER.

The Court will grant a *mandamus* to burgesses, &c. to inspect the corporation books, but *semb.* that there is no general right in every person to inspect the books of Quarter Sessions. (*a*)

Park now moved for a rule, calling upon the defendant to shew cause why he should not permit the plaintiff to take a copy of the writ in question, for the purpose of enabling him to frame his declaration, upon an affidavit, stating that the defendant had the writ now in his possession, but refused to allow the plaintiff to inspect, or take a copy of it. Undoubtedly the direct course to obtain possession of the writ would be, to rule the defendant in the Court of Great Session to return it; but inasmuch as such an application could only be made at the next Session, it would be too late for the purpose for which the plaintiff desired to inspect the writ, namely, to prepare his declaration and serve it upon the defendant. He submitted, however, that this Court had authority to grant the present application, upon the general principle acted upon by

(*a*) The general right which has been supposed to exist with respect to the inspection of the books of Quarter Sessions, seems to depend upon an authority in *Wilson's* Rep. 1 vol. 297, *Herbert* v. *Ashburner*, K. B. which is thus reported:—"Rule to shew cause why the *defendant* should not have liberty to inspect the books of the *Sessions of the corporation* of *Kendale*. It was objected that the party is not entitled to see the books unless he can shew to the Court by affidavit that they contain matters relating to the thing in question, which is, whether the *park lands* be within the town or corporation of *Kendale*. *Sed per Curiam*, there are public books which every body has a right to see; and the rule was made absolute without hearing the other side." See also the *King* v. *Berking*, which is said to have been thus cited *arguendo* in the case of the *King* v. *Purnell*, 1 *Wils.* 240. This was an indictment for following a trade, not having served seven years as an apprentice, which was removed here by *certiorari*, and a rule was made to inspect the books and records of the court or corporation where the indictment was found. And it was observed in argument at the bar, that this was nothing more than what the party had a right to, as well as every subject in the kingdom has a right to see any public record, as an indictment is. But in 1 *Bla.* Rep. 39. it is mentioned that the case of *Rex* v. *Burkins*, 7 *Geo.* 1. was an indictment at a borough sessions removed into K. B. by *certiorari*. The Court said, the *defendant* might have a rule on the *clerk of the peace* to have a copy of the names on the back of the indictment. These authorities therefore do not seem sufficiently strong to establish the *general* right contended for. In *Peake's* Ev. 4th ed. 98. it is laid down that proceedings of courts of justice may, it should seem, be inspected by every person who is interested in them, *Herbert* v. *Ashburner*, 1 *Wils.* 297; *Wilson* v. *Rogers*, 2 *Stra.* 1242; *Edwards* v. *Vesey*, *Hardw.* Rep. 128; *Tidd*, 6th ed. 625, 6.

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the Court, in calling upon third parties to allow suitors of the Court to inspect documents and papers, in which they had an interest; as for instance, in cases where a party is the depositary of deeds or instruments, in which different persons are interested, and for whom he is the agent. It was true, that the writ in question was, strictly speaking, part of the process of the Court of Great Session; but still, being a document in the hands of the sheriff, he might be called upon to allow the plaintiff to have copy of it, upon the principle referred to, to which this application was analogous. [ABBOTT C. J. The ordinary case, where the Court allows a party to inspect documents in the hands of a third person, is that in which the party called upon is the trustee for the applicant. Those cases are, not where the documents came originally into the trustee's hands for his own benefit, but for the benefit and advantage of the party desiring to see them.] That would be the case of the writ in question; because although the sheriff has an interest in the possession of the writ, still the plaintiff has such an interest in it as will entitle him to an inspection of it. [ABBOTT, C. J. The writ is the process of the Court, which the sheriff is to execute. HOLROYD J. The regular course of proceeding would be to rule the sheriff in the Court of Great Session to return the writ. But it is said, that the time for declaring would have elapsed before such an application could be made, and consequently that the party would have no remedy in that way. The Court of Great Session in *Wales* have certainly a power over their own process, so as to call it in, and I do not know of any other mode of coming at the process but by an application to that Court; and it seems to me that the application should be made there.] The Court of Great Session has no power to call upon a sheriff to return a writ after the expiration of six months. This application is an

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ogous to the ordinary power which the Court has of enabling a party to inspect the books of Quarter Sessions, for which there is an authority in *Wilson's* Reports. (*a*) [ABBOTT C. J. We grant *mandamuses* to inspect corporation books, as a matter of right, to burgesses who have an interest in the corporation; but I know of no right that this Court has to authorize a person to inspect the books of Quarter Sessions.] The books of Quarter Sessions are public property, and every one has a legal right to inspect them. [ABBOTT C. J. That is a proposition to which I can by no means accede; it is too general. I am not aware that every man has a right to inspect the books of all the Quarter Sessions in *England*, and say to the clerks of the peace, "let me see your books."] Such he had always understood to be the practice.

ABBOTT C. J. This is an application to which it appears to me this Court has no power to give effect. It is said that the application to the Court of Great Session would be of no avail, because it would be too late for the purpose of this action. The plaintiff, in effect, calls upon us to compel the defendant to find evidence against himself. That would be contrary to every principle of justice, and therefore the motion cannot be complied with.

BAYLEY J. The only mode of relief is to apply to the Court of Great Session for a rule, calling upon the sheriff to return the writ. If this will not answer the purpose we cannot call upon him to furnish evidence against himself.

HOLROYD J. The plaintiff has been guilty of a default in not calling upon the sheriff before the proper tribunal to return the writ, and finding that he has not

(*a*) See *Herbert* v. *Ashburner*, 1 *Wils.* 297.

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evidence to support the charge against the sheriff for neglect of duty, he now applies to this Court to make the sheriff find evidence against himself. This is contrary to all rule.

BEST J. concurred

Rule refused.

Wednesday, June 16th.

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Where a declaration stated, that before the publishing of the libel a carriage driven by plaintiff had run against another without plaintiff's negligence or default, and a person had been thrown out and killed, and that defendant published the libel of and concerning *the said accident*, Held that although it was proved that the accident did happen through the negligence of plaintiff, yet there was no variance, the accident and the cause of it being divisible. (*a*) An action lies for a libel, stating that although plaintiff was aware of the death of a person occasioned by his improper driving a carriage against that in which the person was driving, he attended a public ball in the evening of the same day. (*b*)

ACTION on the case for a libel. The declaration stated in the first count, that before the publishing of the libels by the defendant of and concerning the

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(*a*) So in *Figgins* v. *Cogswell*, 3 *M.* & *S.* 369. where the declaration stated that the plaintiff at the time of speaking the words was of two trades, and that the defendant intending to injure him in his several trades as aforesaid, and to prevent persons from employing him in the way of his said several trades, in a certain discourse which he had of and concerning the plaintiff in one of his trades, spoke the words; it was held, that though the plaintiff failed to prove that he was of both trades, he might nevertheless recover, upon proof that he was of that trade concerning which the defendant was charged to have spoken the words. See also, *Hall* v. *Smith*, 1 *M.* & *S.* 287. In an action against the proprietor of the Oracle newspaper, for a libel on the True Briton, where the declaration averred that the plaintiff was the proprietor, editor, and publisher of the True Briton, and the plaintiff proved that he was proprietor and publisher but failed in proving tha the was editor, Lord *Kenyon* nonsuited the plaintiff, and on motion by *Wood* for a new trial, his Lordship, and *Ashburst*, and *Grose* Js. were of their opinion, that the whole allegation ought to have been proved; but *Lawrence* J. intimating some doubt, a rule was granted, but afterwards a *stet processus* was entered by consent. *Heriot* v. *Stuart*, 1 *Esp*.R. 437, 8. An introductory averment in an information for a libel, that outrages had been committed in and in the neighbourhood of *Nottingham*, is divisable, so that it need not be proved that they were committed in both places. The *King* v. *Sutton*, 4 *M.* & *S.* 532. An allegation, in an action against the sheriff for falsely returning *nulla bona* to a *fieri facias* against two defendants, that both the defendants had seizable effects, is satisfied by proving that there

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said plaintiff hereinafter set forth, to wit, on, &c. a certain carriage, in which one *Eliz. Shewin* was riding, passing, and travelling on a certain public highway, called the *King's Road*, in the parish of *St. Luke's, Chelsea*; and the plaintiff was also then and there, to wit, on the same day and on the same road, driving a certain other carriage, to wit, a carriage called a Dennett, and thereupon *it then and there happened, without any negligence, default, or furious driving on the part of the said plaintiff*, that the said two carriages came in contact together and *accidentally* ran against each other, by means whereof the carriage in which the said *E. S.* was then and there riding, was unavoidably and *accidentally* overturned, and the said *E. S.* was then and there cast and thrown out of the said carriage upon the ground, and then and there was so grievously bruised, cut, and injured, that she then and

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was property of one of the defendants. *Jones* v. *Clayton*, 4 *M.* & *S.* 649. In *Rex* v. *Shaw*, 2 *Bla.* Rep. 789. the judges inclined to think, that a prisoner might be convicted on a count in an indictment charging him as sorter and charger of letters in the post office, by a finding that he was a sorter only. If one count of a declaration contain several actionable words, the plaintiff will be entitled to a verdict, on proof of some of them. *Compagnon* and wife v. *Martin*, 2 *Bla.* Rep. 790. On a charge of petit-treason, if the killing with malice is proved, but no circumstances of aggravation are proved to make the offence treasonable, the prisoner may be found guilty of the murder. Case of *Swan* and another, *Foster*, 104. So on an indictment for burglary and stealing goods, if it appear that no burglary was committed, as where the breaking and entering were not in the night; or on a charge of robbery, where the property was not taken from the person by violence, or by putting him in fear, the prisoner may be found guilty only of the simple larceny, 2 *East.* P. C. 513; *Phil.* Ev. 164. On the trial of an indictment for murder, the jury may find the prisoner guilty of manslaughter only; for the principal matter is the killing, and the malice is only a circumstance in aggravation. *Co. Lit.* 281 *b.* 282 *c.*; and cases in margin, *Phil.* Ev. 164. It is, in short, a general rule in the criminal law, that it is sufficient to prove so much of the indictment as shows the defendant to have been guilty of a substantive crime therein stated, though not to the full extent charged against him. *Rex* v. *Hunt*, 2 *Campb.* 583; *Chitty*, Crim. L. 1 vol. 558. There seems therefore to be a great uniformity in the cases respecting partible allegations.

(*b*) Written slander is in general actionable, when it imputes defects in *moral* virtue. *Haley* v. Lord *Kerry*, 4 *Taunt.* 355; 3 *Campb.* 214; 2 *East*, 430, 1; 1 *Price* Rep. 11.

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there died of the said cuts, bruises, and injuries, to wit, on, &c. aforesaid, at the parish aforesaid; yet the said defendant, well knowing the premises, but contriving to injure plaintiff in his fair name and reputation, and to bring him into public scandal, &c. with his neighbours and other subjects of the realm, and to cause it to be believed that *the said accident* and that the death of the said *E. S.* was occasioned by the carelessness, negligence, and furious driving of the said plaintiff; and also to cause it to be believed that it was proved in evidence before the coroner's inquest which sat on the body of the said *E. S.* that her death was occasioned by the misconduct of the said plaintiff; and further intending to vex, harass, and oppress the plaintiff, heretofore, towit, on the 31st of *May* 1818, at the parish of *St. Mary le Strand*, in the city of *Westminster*, in the county of *Middlesex* aforesaid, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published of and concerning the said plaintiff, and *of and concerning the said accident*, and of and concerning the evidence given before the coroner's inquest which sat on the body of the said *E. S.* a certain false scandalous, malicious, and defamatory libel, containing amongst other things the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the said plaintiff, and *of and concerning the said accident*, and of and concerning the said evidence, that is to say—" Furious driving.—A reader of the Examiner trusts that the editor of that paper will not fail to notice in his next publication the very melancholy accident which occurred in the *King's Road*, on *Wednesday* in the last week, occasioned by the furious and careless driving of a certain young nobleman, Lord *Charles S. Churchill*, &c." [The first count proceeded in this manner to set out the libel, which charged that the accident had been occasioned by the furious and careless driving of

the plaintiff, and that the evidence before the coroner proved that it was so occasioned.] Second count: And the said plaintiff further saith, that the said defendant further intending and devising as aforesaid heretofore, to wit, on, &c. (*a*) falsely did publish a certain other false, scandalous, and malicious libel of and concerning the said plaintiff, and *of and concerning the said accident*, containing amongst other things the libellous matter following of and concerning the said plaintiff, and *of and concerning the said accident*, that is to say, [The libel set out in this count, charged that the accident was owing to the plaintiff's hard driving; and also the following words: "We are informed, but can hardly believe the relation, that though this young nobleman was fully aware of the shocking death of the lady, he on the very evening of the catastrophe attended a public ball."] Another count charged that the defendant had publisbed a libel of and concerning the said plaintiff, and of and *concerning the said accident*, containing amongst other things certain other libellous matters of and concerning the said plaintiff, that is to say, &c. &c. (*b*) The defendant pleaded the general issue to the whole declaration: and a justification to the whole of the libel set out in the first count, and to such parts of the libels set forth in

(*a*) *Venue* omitted by mistake in this count.

(*b*) The libel set out in the third count was in part as follows: "Lord C. has thought proper to commence actions against the newspapers, for having in their account attributed the accident to his hard driving. This is their offence, and this is his mode of clearing himself. His renowned ancestor (meaning *John* Duke of *Marlborough*), as our readers well know, took a different method to distinguish himself: he did indeed commence many actions, but then they were public and glorious ones, which we venture to predict will not be this gentleman's fate. Our King's Bench hero (meaning plaintiff) differs from the conqueror in this, that he does not like to come to close quarters, for some of the processes served cannot be noticed for these five months, &c. The whole business, as it strikes us, is of a very disgusting description, and one which we cannot but believe, when his Lordship arrives at years of discretion, he will look back upon with mortification and sorrow."

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the other counts as accused the plaintiff of having occasioned the accident by his furious and careless driving. But there was no justification as to the other parts of the libels, which charged the plaintiff with having "gone to a public ball on the evening of the catastrophe, although he was fully aware of the shocking death of the young lady." The cause was tried before BAYLEY J. at the sittings in *Westminster*, after last Term, when a verdict was found for the plaintiff (damages, 50*l.*) in respect of that part of the defamatory matter to which the general issue only had been pleaded in the manner above described. The issue on the justification was found for the defendant; so that the jury found that it was not true as stated in the declaration, that "it happened without any negligence, default, or furious driving on the part of the plaintiff, that the two carriages came in contact together and accidentally ran against one other." The declaration however stated in all the counts, that the libels therein mentioned were composed and published "of and concerning *the said accident*;" and on the trial it was contended on the part of the defendant, that as the jury found that *such* an accident had not happened, that is, that it had not happened in the *manner* stated in the prefatory part of the declaration, a verdict ought to be entered for the defendant on all the issues. The learned Judge however overruled the objection, and directed the jury to find a special verdict, in order that the defendant's counsel might afterwards have the benefit of the objection taken at the trial. And now,

F. C. Williams moved accordingly for a rule to shew cause why the verdict should not be entered for the defendant on all these issues. He contended that the legal effect of the finding of the jury for the defendant, on the first court, was a finding for the defendant on every issue, because the jury found that no such

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accident as was stated in the declaration ever took place. They found that the accident, so far from happening without the fault, negligence, and furious driving of Lord *Churchill*, did happen and result from his furious driving. It was obvious that the averment, "That the accident had happened *without the fault, negligence, and furious driving of the plaintiff*," was a material averment. The Court would see that the libel was stated to have been published "of and concerning" the accident, which was alleged to have been occasioned by "furious driving;" the averment to the contrary therefore was most material, both with respect to the nature of the injury, the damages to which the plaintiff was entitled, and the description of the libel itself. The defendant was charged with publishing a libel, which libel was "of and concerning the plaintiff, and of and concerning an accident which happened without the fault, negligence, and furious driving of the plaintiff;" and the only accident given in evidence was one which was occasioned by the fault, negligence, and furious driving of the plaintiff. [BAYLEY J. Then there was a justification to every count?] Certainly, as to the "furious driving." [BAYLEY J. The question for the opinion of the Court is, whether the introductory part of the declaration is to be considered as an *entire* and *indivisible* allegation.] This is certainly the question; but it was to be observed, that the words "of and concerning the aforesaid accident" were repeated in the body of every count, alluding to the allegation in the first count. He contended that that allegation was indivisible, and was in fact part of the libel itself. [BAYLEY J. The accident here is the coming together of the two carriages. That is the accident; and if that accident was occasioned without the default, negligence, and furious driving of the plaintiff, then he is free from all imputation and blame.] The accident all

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along referred to in the declaration is the coming together of the two carriages, *without the fault, negligence, or furious driving of the plaintiff.* The Court must see that no libel was written of such accident, because the jury found that no such accident had happened; for they found that it had been produced *by the negligence and furious driving of the plaintiff.* The accident, and the cause from which it proceeded, were inseparable. Lord *Mansfield,* in *Rex* v. *Horne,* (*a*) held, that in a declaration which charged certain words to have been written "of and concerning his Majesty's government and the employment of his troops," the words "of and concerning" were sufficient introduction to the matter contained in the libel, and a sufficient averment that it was written "of and concerning the King's government and the employment of his troops." This case was subsequently removed by a writ of error to the House of Lords, when *De Grey* J. said, It is put upon the record by these words, "that the defendant wrote and published such a libel of and concerning his Majesty's government and the employment of his troops." This is an averment, for the fact is, that "he wrote and published the libel;" and the circumstance connected with that fact, and which therefore makes a part of it, is, that "he wrote and

(*a*) *Cowp.* 672. Lord *Mansfield* also says the gist of every charge of every libel consists in the person or matter of and concerning whom or which the words are averred to be said or written. In the *King* v. *Alderton, Pasch.* 29 *Geo.* 2. the information was held bad because it was not laid in the information that the libel was of and concerning the Justices of *Suffolk.* Where the words are averred to have been spoken of and concerning the King's government, or of the government of the kingdom, or of the government of the navy;—as to any thing further of which they are also written, or any *particular circumstances* mentioned in the libel, through the medium of which it calumniates the King's government, they *need not* be particularly noticed in the *introductory* part of the information. The case of the *King* v. *Horne* would have been more in point if the introductory averment had been that the words were spoken of the *lawful* employment of the King's troops, and it had turned out that the employment was not lawful.

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published the paper or libel" of and concerning his Majesty's government and the employment of his troops. If the jury, upon the defence set up, had found that the libel was not published relative to the King's government or the employment of his troops, the information was not proved: for it contains an entire proposition. And if it had appeared, that the paper related to a voluntary act of the troops only, and not to an employment of them by government, the information would have been false, because the prosecutor would have failed in the proof of the proposition, that it was written "of and concerning the King's government and the employment of his troops." The proposition thus laid down by *De Grey* J. was the same in the present instance. Every count incorporated the accident with the cause; and the jury having found for the defendant on the first count, the finding should have been the same way in all the rest. It was clear, from the doctrine laid down in the case referred to, that the accident and the cause were not divisible. The declaration averred, that the accident happened without any fault, negligence, or furious driving of the plaintiff, and the averment in every count was the same; and as the only accident which was given in evidence was that which had occurred by the fault, negligence, and furious driving of the plaintiff, the jury negatived the existence of an accident of a different character, and their finding was in effect a finding for the defendant on the whole of the counts.

ABBOTT C. J. It appears to me that the word "accident" applies to the collision of the carriages, and not to the specific injury done to the persons riding. The plaintiff alleges that the accident was without his fault, and the defendant alleges the contrary. This seems to me to be the effect of the introduction on the record "of the words" of and concerning that acci-

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dent; that is, the accident which he alleges occurred without his fault. Taking that to be the meaning, then the libel does relate to the accident which the plaintiff has alleged to have taken place without his fault. I am of opinion, therefore, that the direction of the learned Judge was right.

BAYLEY J. The plaintiff is not bound to prove the whole of his introduction. It appeared to me on the trial, and I am of the same opinion still, that the allegation in this declaration was in substance a divisible allegation, containing two statements; the one referring to the collision of the carriages, and the other to the cause of that collision; each of which being entire, the allegations are distinct and several, and the plaintiff was not bound to prove both.

HOLROYD J. I think that the allegation on the record, that the circumstance happened without the fault and furious driving of the plaintiff, is not part of the description of the accident, but is a distinct allegation concerning that accident. It is not necessary that such allegations should be proved. The accident was the collision of the carriages; and in the pleadings exception is only taken to the cause by which that accident was produced. It appears to have been so considered by the defendant himself; because, when the plaintiff alleges that the accident happened "without his fault, negligence, or furious driving," he, the defendant, says, "the said accident happened by the furious driving of Lord *Churchill.*" Therefore the allegation respecting the cause of the accident is distinct from the accident itself. That being the case, the finding of the jury that the accident did happen through the furious driving of the plaintiff, in my opinion does not disprove any part of the declaration which is material to the question at issue.

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BEST J. What is the meaning of the word "accident," as used in the present instance? It appears to me to be the unfortunate result of a particular course of conduct pursued by the plaintiff. The word "accident" only imports the event, and not what tended to it. The result, and the cause from whence it arose, are clearly divisible. In the case of The *King* v. *Horne*, the libel was not "Of and concerning the King's troops," but "Of and concerning their being employed." The proposition stated in the libel was therefore indivisible.

Rule refused.

MALTBY *against* MOSES.

Tuesday, June 22d.

Where a cause was set down for the first Sittings in Term, but defendant obtained a rule for a special jury, the Ch. J. directed that the cause should be tried at the second Sittings, on a suggestion that the rule was obtained for delay, and the Court refused to discharge the rule for a special jury. (*a*)

F. *POLLOCK* on a former day obtained a rule to shew cause why the rule for a special jury in this case should not be discharged, on the ground that it had been obtained for the purpose of delay.

The Court in Bank will not give directions as to the order in which a special jury cause shall be taken at *nisi prius*, though special jury appears to have been obtained for delay.

(*a*) See *Sermon* v. *Bucknell*, post, in this Term, *June* 29th. The Court in bank will not give directions as to the order in which a special jury cause shall be taken at *Nisi Prius*, though the special jury appears to have been obtained for the purpose of delay. *Anon. Hil.* T. 1817, *Feb.* 3. *Raine* made an application for a special jury to be appointed on a particular day, on the ground that it had been obtained for delay; and on the authority of *Roberts* v. *Bradshaw*, 1 *Stark.* 31. Lord *Ellenborough* C. J. at first said, the Court thought it must be only a *rule nisi*, as they could not grant a rule absolute merely on an exparte affidavit:—and afterwards his Lordship intimated, that the Court upon consideration were of opinion the rule could not be granted in the manner prayed, as they never interfered in bank to appoint a special jury on any trial for a particular day. They said such an application must be made to the Judge at *Nisi Prius*. *Raine* therefore took his *rule nisi*, merely to discharge the rule for a special jury (his affidavit stating an acknowledgment that the rule for a special jury was obtained merely for delay). The same rule has been adopted in C. P. *Johnson* v. Coke and Gas Light Company, 7 *Taunt.* 390.

Where it is apparent that the rule for a special jury has been obtained [f]or delay, the Court will order the rule to be discharged: as where the de[fe]ndant had before pleaded a sham plea, and had offered to pay the bill,

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Wilde now shewed cause, and contended that this case did not fall within the general rule upon which the Court acted in discouraging rules for special juries. It was an action upon a bill of exchange, and had been set down for trial at the first Sittings in this Term. The defendant, before the last mentioned day, had obtained a rule for a special jury, which had been served upon the plaintiff's attorney, and the jury had in fact been struck. In the mean time, however, the plaintiff had applied to the Court to discharge the rule; but he submitted, that under

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and afterwards to give another bill, or a *cognovit*. *Anon. Mich.* T. 1815, *Nov.* 21st. *Campbell* moved to discharge a rule for a special jury, on the ground that it had been obtained for the purpose of delay. The action was brought against the defendants, as acceptors of a bill of exchange. The defendants pleaded a sham plea, and at first offered to pay the bill, and afterwards to give another bill, or a *cognovit*. *Le Blanc* J. thought these sufficient grounds to warrant the application, and granted a rule accordingly.

Where a rule for a special jury was obtained for delay, as where defendant pleaded a sham plea, and at first offered to pay the bill, and afterwards to give another bill or *cognovit*, the Court discharged the rule for a special jury.

But the rule for a special jury will not be discharged, nor any terms imposed, where it does not appear that the special jury rule has been obtained merely for the purpose of gaining time. *Anon. Trin.* T. 1813, *Wednesday, June* 30th. *Owen* shewed cause against a rule obtained by *Reader*, to discharge a rule for a special jury; he admitted there had been acknowledgments of the debt, but contended they had been given under a delusion produced by the plaintiff: it was an action brought in consideration of getting the defendant appointed joint lecturer of an hospital. *Bayley* J. said that this was not one of the cases in which the Court would make this rule absolute. But intimated that the defendant must consent to give the plaintiff judgment of this Term, if he should obtain a verdict in his favour. On the next day, however, the learned Judge said that he ought not to have imposed these terms; that it was never done, except when the application is made for delay, and every thing in this case seemed to indicate a contrary intention. Rule discharged.

The rule for a special jury will not be discharged, nor any terms imposed, where no delay appears; nor will it be presumed to have been obtained for delay, though defendant acknowledged the debt, if he was under a delusion produced by the plaintiff.

If an affidavit of merits be produced in answer to a rule for discharging the rule for a special jury, the Court will act upon it, and will not try the cause upon such an application. *Anon. Trin.* T. 1816, *June* 26th. *Scarlett* shewed cause against a rule obtained by the Attorney-General to discharge a rule for a special jury, and produced an affidavit of merits. The Attorney-General contrà, contended against the affidavit of merits. But the *Court* said, that as the defendant swore to merits, they must act on that affidavit, as otherwise they would have to try the cause on affidavits on this summary application. Rule discharged.

If there is an affidavit of merits in answer to a rule to discharge a special jury, the court will act upon it, and will not try the merits upon this rule.

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these circumstances the case did not fall within the principle usually acted upon by the Court in such cases, inasmuch as the defendant had done every thing but issue the *distringas*. The cause having stood over from the former Sittings, might be tried to-morrow by a common jury at the second Sittings; but the special jury rule having been obtained, it could not be tried without an appointment.

ABBOTT C. J. said that if the plaintiff would summon a special jury for to-morrow, and place the cause in the paper, he would try it, though out of the ordinary course of business, in order that the plaintiff might not be delayed, and at the same time give the defendant the benefit of having his cause tried by a a special jury.

Under these circumstances the Rule obtained by *Pollock* was discharged.

THE KING *against* HOOPER *and* OTHERS.

Wednesday, June 23d.

Where a defendant indicted at the Quarter Sessions for a conspiracy, had entered into insufficient recognizances to take his trial; Held, that this Court, on a removal by *certiorari*, might discharge them on motion, and compel him to enter into better securities. (*a*)

A BILL of indictment having been found at the Quarter Sessions for a conspiracy against the defendants, one of whom was an attorney, the latter persuaded the magistrates before whom he was taken upon a warrant, to take his own recognizance in the sum of 5*l.* and that of his clerk, a minor, in the like sum, to appear to take his trial upon the indictment, which had been since removed into this Court by *certiorari*. On a former day a rule was obtained, calling upon the defendant to shew cause why

(*a*) As to recognizances on a removal by *certiorari*, 5 *W.* and *M.* *c.* 11. *s.* 2. 1 *Chitty's* Crim. Law, 383 to 386; and as to the manner of bailing a defendant after indictment found, see the Duchess of *Kingston's* case, *Cowp.* 283. 1 *Chitty's* Crim. Law, 344 to 346.

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the recognizance and surety so accepted should not be discharged, and why he should not enter into more effectual securities adapted to the nature of the offence with which he was charged. Counsel being heard on both sides this day,

The COURT said, that under the circumstances stated upon affidavit, this was an application which might be sustained at the discretion of the Court. In taking recognizances, magistrates ought to be left to the exercise of their discretion, without being subjected to the influence of a defendant, however respectable his character and station in life may be. In the present case, the defendant had interfered with the discretion of the magistrates in a manner not to be justified; and as the securities given appeared not to be sufficient, considering the nature of the crime, the rule prayed for ought to be made absolute.

Rule absolute.

Casberd for the defendant. *Campbell* for the prosecution.

Saturday, June 26th.

JACKSON'S *Bail.*

Notice of bail residing "at *Liverpool*" too general, but time allowed. (*a*).

CHITTY opposed the justification of bail by affidavit in this case, on the ground that the notice

(*a*) It has always been held insufficient to describe the bail as of *Liverpool*, *Lancaster*, *Leeds*, *Leicester*, or such large towns, without any farther description to direct the plaintiff in his enquiries as to their sufficiency. *Anon. Mich.* T. 1816. *Nov.* 23. Justification by affidavit.—*Adams* opposed the justification of bail, on the ground that they were described as "of *Lancaster*" generally. *Holroyd* J. rejected the bail, but allowed time to justify. *Le Blanc* Master observed, that it had been decided before that "*Leeds*" and "*Leicester*" were not a sufficient description. *Holroyd* J. afterwards said that different parts of *Lancaster* were known by different names, by which any person's residence would be described, and therefore this was a good reason why the bail should be rejected. See also *Anon. Mich.* T. 1815. *Nov.* 27th.—*Spankie* moved for

of justification was of bail residing "at *Liverpool*," which he submitted was too general.

Time allowed to enquire where bail was described of *Liverpool*.

time to enquire respecting the sufficiency of bail who were described in the notice of justification as of *Liverpool* only, which he said was a large place, and the description was too indefinite. *Le Blanc* J. allowed time accordingly.

So it is insufficient to describe the bail as of *Love Lane* in the city of *London* and of *Walworth Surry*. *Anon. Mich.* T. 1817. *Nov.* 15th. The notice of justification described the bail as living at "*Love Lane* in the city of *London* and of *Walworth* in *Surry*." *Holroyd* J. said that it was an insufficient description, but allowed time to justify.

Walworth generally is not a sufficient description of bail. So "*Surrey Cottage Kent Road*" is insufficient.

See also *Anon. Mich.* T. 1813. *Nov.* 18th. Bail were described in the notice as of *Walworth* generally, without mentioning any street. *Bayley* J. said that the description was insufficient. Bail who was described as of "*Surrey Cottage Kent Road*," was also considered incapable of justifying.

A description of bail as of one of the large villages near *London*, of *Clapham*, for instance, is too general, if there be a known and particular designation for the spot in which the bail resides. *Rickman* v. *Hawes*, 5 *Taunt*. 173. It is not sufficient to describe the parish, when the name of a street or other such distinction can be given to the residence. *Lofft's* Rep. 72. 194. *Tidd*, 260. But it seems the Court will not take judicial notice of the extent or population of the place of which the bail are described; and if the description be too vague in respect of the size of the street or place, that fact must be made to appear by affidavit. —— v. *Costar*, 5 *Taunt*. 554.

Bail allowed to justify where described of "*Lancaster*" generally, because the plaintiff had had a long time for enquiry.

It has been held, however, that where the plaintiff has had a long time to enquire after bail, the bail shall not be rejected on account of a generality of description, which would otherwise have been a fatal objection. *Wells's* Bail. *Jan.* 23d. *Hil.* T. 1817. *Chitty* opposed the justification of bail, on the ground that one of them was described in the notice of justification, as "of *Lancaster*" only, and this he submitted was too general a description. But the notice of justification being dated the 25th *Nov.* 1816, and this day being the 23d *Jan.* 1817,—*Abbott* J. overruled the objection, on the ground of the plaintiff's having had so long a time for enquiry. See also *Taylor's* Bail, *post*.

A misdescription of the number of the house in which the bail resides is a ground of rejection.

A *mistake* in the number of the *house* in which the bail resides, is a ground of rejection. *Hil.* T. 1815. *Espinasse* opposed the justification of bail, on the ground that the notice of justification described one of the bail as living at a house the number of which was 44, when in fact he lived at No. 1. *Bayley* J. The notice is bad on account of the misdescription; but I will allow you time for the purpose of coming with a notice in which the error may be corrected.

Bail described as of three different places in each of three notices of justification, rejected.

So bail described in three different places in three notices of justification, may be rejected on this account. *Proteus's* Bail, *Mich.* T. 1815. *Nov.* 17. *Adolphus* moved to justify bail, who in the first notice of justification was described as living in *St. Martins le Grand*, in the second notice as at *Rathbone Place*, and in the last as in *Tottenham Court Road*. *Adolphus* said

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BEST J. thought the objection unanswerable, but gave two days further time to amend the notice.

Littledale for the defendant.

the fact was, he was an auctioneer in *St. Martins le Grand*, a broker at *Rathbone Place*, and had nearly furnished a house in *Tottenham Court Road*. But *Dampier* J. thought the description too uncertain, and rejected him.

"Gentleman" is a sufficient description for a clerk in the Custom House, or for a schoolmaster. But a servant must not be described as a gentleman.

Besides the places of residence, it is necessary also that the notice should contain a correct statement of the degree, mystery, trade, or profession of the persons put in. 5 *Taunt*. 554. *Anon.Trin*. T. 1814. *June* 27th. Bail were opposed, on the ground that one of them was described in the notice by the addition of "Gentleman, of," &c. and it appeared on examination that he held a situation as clerk in the Custom House. *Le Blanc* J. held that the description was sufficient. In —— v. *Pasmun*, 5 *Taunt*. Rep. 759. *Heath* J. held that a schoolmaster might be described as a gentleman. (Vide 2 Inst. 668. as to the meaning of that denomination.) In a case which occurred on 6th of *Nov*. *Mich*. T. 1815. where it appeared on the justification of bail, that one of the bail who was described as a gentleman was in fact a servant, *Le Blanc* J. held that he ought to be rejected for the misdescription.

"Shopkeeper" held an insufficient addition, where bail had been before described as a grocer, and there were other circumstances of suspicion.

It seems that Shopkeeper may be a sufficient description of bail, though bail so described have been rejected under particular circumstances.— *Anon*. *Mich*. T. 1815. *Nov*. 17th. One of the bail was described in the notice of justification as a Shopkeeper; and *Dampier* J. said he was told by the master that that description had often been used and never objected to. *Puller* said that the bail had been described before as a Grocer, and insisted that there were circumstances in this case which ought to make his addition correct. *Dampier* J. These circumstances should have induced the defendants to take care that all the additions and descriptions of the residence of the bail were correct, and free from all suspicion, and therefore the bail must be rejected.

Christian names of bail must be inserted in the notice of justification as well as notice of bail.

It is also necessary that the Christian names of the bail should be inserted in the notice of justification, as well as in the notice of bail. *Taylor* v. *Halliburton*. *Mich*. T. 1814. *Nov*. 22d. *Lawes V*. moved to justify bail, stating that the Christian names of the bail were inserted in the notice of bail but had been omitted in the notice of justification, and he contended that this was immaterial. But *Le Blanc* J. said it was always usual to insert the Christian names in the notice, and held it was insufficient.

It is a good ground of rejection, that one of the bail is described in the notice of justification as the bail put in before, and is described by a different Christian name from that which was before given.

It is a good ground of rejection, that one of the bail is described in the notice of justification as the bail put in before, and is described by a different Christian name from that which was before given. *Hamilton's* Bail. *Anon*. *Mich*. T. 1814. *Nov*. 12th. *Lawes, E*. opposed bail, on the ground that in the first and second notices of justification one of them was called *William Saunders*, but in the third, "*Samuel Saunders*, bail put in before," without any other description. *Dampier* J. It is sufficient.

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CARRINGTON'S *Bail*.

Affidavit of justification of country bail must state in the *jurat* the place at which it was sworn; but time will be allowed to amend the defect. (a)

CHITTY objected to the justification of the bail in this case, by affidavit, on the ground that the affidavit of justification was defective, no place being mentioned in the *jurat*.

BEST J. held the objection valid, but allowed time until the last day of Term to amend the affidavit.

Denman for the defendant.

(a) In the case of The *King* v. the Justices of the West Riding of *Yorkshire*, 3 *M.* & *S.* 493. it was held that affidavits must contain in the *jurat* the place where they were sworn, by which one medium is afforded to the Court of referring to their records, and ascertaining that the person by whom any particular affidavit is taken is a Commissioner. But in the case of bail time is in general allowed to amend defects in the *jurat*.

Time to justify bail may be allowed where there is an erasure in the *jurat*, and where the deponents' names are not mentioned therein.

Anon. East. T. 1816, *May* 1. Application was made for time to justify bail, there being an erasure in the *jurat*, and the deponents' names not being inserted therein. (*Tidd.* 520.) *Bayley* J. said that the objections were fatal, but that time might be allowed. So in the case of *West's* Bail *Nov.* 6th. *Mich.* T. 1816, *Abbott* J. allowed time under similar circumstances, although the learned judge observed that if the rule were now to be established, he should have thought that holding the rule strictly was the only mode of ensuring regularity, but that it had been thought otherwise by the other judges. See also *Anon. Nov* 18th. *Mich.* T. 1816. *Campbell* moved for time to justify bail, the deponents' names not being inserted in the *jurat*. *Bayley* J. stated that it was now settled under such circumstances that time ought to be allowed, observing that it was too hard to fix the sheriff with responsibility for such an error in the commissioner. See also *Anon. Nov.* 22. *Mich.* T. 1816. *Spankie* moved to justify bail, it appearing that there was an alteration in the *jurat*, although the commissioner's initials were placed against it. *Bayley* J. said it would not do; but the learned Judge, at the prayer of *Spankie*, allowed time to justify.

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WILLIAMS'S *Bail*.

Notice of bail named *Lloyd*, with double L, and in affidavit

ONE of the bail of whom notice had been given in this case was named *Lloyd*, and the name was spelt with *Ll*; but in the affidavit of justification the name was spelt with a single *L*. and

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of justification with a single L, time allowed to amend. (*a*)

BEST J. was of opinion that the proceedings must be amended; but allowed time for that purpose, until the last day of term.

(*a*) It seems to be no answer to an objection in such a case, that the names are *idem sonans*. *Brown* v. *Jacobs*, 2. *Esp. Rep.* 726.

Affidavit allowed to pass conditionally, where the deponent was described as agent for Plaintiff instead of Defendant's agent.

An affidavit of the service of notice of justification of bail, in which the deponent is described by mistake as agent for the plaintiff, instead of the defendant, will be allowed to be passed conditionally. *Anon. May* 6th. *East.* T. 1816. *Petit* moved that the affidavit of the service of notice of justification of bail, in which the deponent was described as agent to the plaintiff instead of the defendant, might pass conditionally provided before the rule for allowance should be drawn up a fresh affidavit was filed in which this error should be corrected. *Bayley* J. granted permission, and *Abbott* J admitted the same the next day.

Saturday, June 26th.

BROWN *against* GILLIES.

Where the rule for the allowance of bail was discharged on account of perjury in one of the bail, and pending the motion for setting aside the allowance the defendant was rendered; Held, that the plaintiff might notwithstanding proceed on the bail-bond. (*a*)

MARRYAT on a former day obtained a rule calling on the plaintiff to shew cause why the proceedings on the bail-bond in this case should not be set aside for irregularity, with costs, the alleged irregularity being that the defendant was rendered before the assignment of the bail-bond.

E. Lawes now shewed cause, and contended that the render was long out of time. The circumstances

(*a*) See *Jackson* v. *Morris*, and *Richardson* v. *Morriss*, cited on shewing cause, 2 *Bla. Rep.* 1179. In both these causes the sheriff was ruled on the 11th of *Nov.* to bring in the body of the defendant. On the 14th of *Nov.* bail were justified and allowed in Court. On the 19th of the same month, a rule was made to shew cause why the allowance should not be set aside, the bail having been surreptitiously put in and justified, which rule on the 27th of *Nov.* was made absolute. In the mean time, on the 21st of *Nov.* the bail surrendered the defendant. But the Court held that as the bail were put in surreptitiously, they were as no bail, and therefore could not surrender, and the rule was made absolute for an attachment against the sheriff. Where the defendant was rendered after the time for putting in bail had expired, but within the further time allowed him for that purpose by the indulgence of the Court, it was held that an attachment issued after notice of such render was regular, and could not be set aside without an affidavit of merits. The *King* v. the *Sheriffs* of *London*, *post*, *June* 30.

disclosed on the affidavit were these: A special *capias* issued against the defendant on the 25th of *April* last, returnable in fifteen days of *Easter*. The defendant was arrested on the day the writ issued, and special bail was put in on the 3d of *May*. Exception was entered to the bail on the 4th, and notice of adding and justifying was given for *Friday* the 7th, on which day the bail justified, and on the 8th the time for rendering would have expired. On the 10th a rule was obtained for setting aside the allowance of bail, on the ground that one of the bail had perjured himself, as to the state of his property; and cause being shewn against the rule on the 13th, the case was ordered to stand over until *Friday* the 21st, for the purpose of giving the bail an opportunity of offering themselves to be again examined as to their sufficiency, and they not having done so the Court made the rule absolute for setting aside the allowance of bail, and directed the defendant to pay the costs. (*a*) On the same day the defendant was rendered, the original time for making the render having expired on the 8th. Proceedings were not taken on the bail-bond until the 22d of *May*. It might be true that the plaintiff had notice of the render on the 21st, but he contended under these circumstances, that the render was altogether invalid, after the gross misconduct of the bail, and he referred to *Jackson* v. *Morris*, (*b*) *Merryman* v. *Quibble*, (*c*) *Meysey* v. *Carnell*, (*d*) *Hardwick* v. *Bluck*, (*e*) and *Rex* v. *The Sheriff of Middlesex*. (*f*)

Marryat, in support of the rule, contended that the render was in time. He insisted that the time for rendering a defendant continued until an action was brought against the bail above, and so long as

(*a*) *Ante*, 372.
(*b*) Sir *W. Bl.* 1179.
(*c*) *Ante*, 127.
(*d*) 5 *T. R.* 534.
(*e*) 7 *T. R.* 297.
(*f*) *Id.* 527.

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the added bail remained on the bail piece. The render here was in all events in good time, because the rule for the allowance of bail was not disposed of until the 21st of *May*, the bail having until the sitting of the Court that morning to appear and justify. The bail were not to be in a worse situation than they would have been on the 7th of *May*, supposing they had been then rejected. In all cases, render was equivalent to justification. Here the defendant had been bailed, and his bail had justified, and they might have rendered their principal at any time before the rule for the allowance of bail was cancelled, and they might at any time have set aside the proceedings upon payment of costs. The render, however, was in time, and consequently the assignment was irregular. It was then suggested by *Lawes*, that there was no affidavit of merits on the part of the bail.

ABBOTT C. J. In this case it appears that there was in fact a justification, and a rule drawn up for the allowance of bail. After that a rule was obtained to set aside the allowance. Pending that rule the bail surrendered their principal. The rule for setting aside the allowance is then made absolute, upon which the plaintiff takes an assignment of the bail-bond. It seems to me to be in this case unnecessary to decide whether an assignment of the bail-bond, taken after such a render and made after the time for justification was expired, is sufficient; because under the special circumstances of the case, I think the render was not sufficient to prevent the plaintiff from taking an assignment. If we were to decide otherwise the defendant would derive an advantage from his having improperly put in bail, the rule for the allowance of which was afterwards set aside. After the rule for the allowance was drawn up, the plaintiff could not take any step. The defendant therefore gets the advantage of the length of time intervening,

in consequence of the motion afterwards made for setting aside the rule for the allowance of bail. It seems to me, that the defendant ought not to have the benefit of any thing done pending the rule for setting aside the justification, which justification ought never to have taken place, and ought not to have been followed up by the rule for the allowance of bail. Under the special circumstance of the case, therefore, I am of opinion that the assignment of the bail-bond ought to stand; and this being an application for setting aside proceedings for irregularity, and moved with costs, the rule must be discharged with costs.

BAYLEY J. If the bail had exculpated themselves from any participation in the fraud of endeavouring to impose upon the Court, as being sufficient to justify when in fact they were not so, it might have had a different effect in the case.

HOLROYD J. & BEST J. concurred.

Rule discharged with costs.

GOODTITLE, *on the demise of*   *against* BADTITLE.

Saturday, June 26th.

Affidavit of service of an ejectment on the wife of the tenant who lived on the premises insufficient, unless it state that the wife lived with the husband, or that the service was made on the premises, or at the husband's house. The rule for judgment cannot be drawn up conditionally. (a)

ADAMS moved for judgment against the casual ejector in this case, on an affidavit that the declation in ejectment was served on the wife of the tenant in possession, who lived upon the premises; but as the affidavit did not go on to state that the wife lived with the husband, he prayed that the rule might be drawn up, upon producing an affidavit of that fact.

But the COURT said, that course would be contrary to all practice, and for this reason, that the rule would

(a) In *Jenny* dem. *Preston* v. *Cutts*, 1 New Rep. 308. where the affidavit was defective in not stating that the wife (on whom the declaration

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BAD TITLE *against* GOOD TITLE.

appear to be drawn up on one day, and the further affidavit would appear to have been produced on another.

Rule refused.

Service of ejectment on the wife of the tenant in possession at his dwelling house, or on the premises, is sufficient, though it be not shown that the husband and wife were living together; but it must be shewn that they were living together when the service is not made on the premises nor at the husband's house.

had been served) lived with her husband, the Court said that the counsel might take the rule, provided a supplemental affidavit was produced that the wife lived with the husband, but not otherwise. It seems sufficient to shew, that service was made upon the wife *at the husband's house*, without stating that the husband and wife were living together. See *Anonymous*, *Trin.* T. 1814, *June* 28th. Motion for judgment against the casual ejector. The affidavit stated, that service of the declaration had been made on the wife of the tenant in possession, at his dwelling house. *Le Blanc* J. thought it sufficient, and granted leave to enter up judgment. Service of the declaration on the wife is good, if it be made on the premises, or at the husband's house, because in those cases it is presumed that the husband and wife were living together; but where the service is made on the wife, but not on the premises, or at the husband's house, it is necessary to state positively that the husband and wife were living together. *Doe* dem. *Morland* v. *Bayliss*, 6 T. R. 765; 2 *Bos.* & *Pul.* 55; 2 *Bla.* Rep. 800; 1 *Bos.* & *Pul.* 384; 1 *Bos.* & *Pul.* New Rep. 308.

Affidavit for judgment against the casual ejector is sufficient, if it impliedly shews that the defendant was tenant in possession at the time the declaration was served on his wife.

It is sufficient if the affidavit state that the service of the declaration has been made upon the wife on the premises, although it be not expressly stated that the defendant is tenant in possession, provided that fact can be collected by necessary inference. *Anon. Trin.* T. 1816, *June* 19. *Campbell* moved for judgment against the casual ejector, on an affidavit stating that the service of the declaration had been made on the wife on a part of the demised premises, but omitted to state that the defendant was tenant in possession. He contended, however, that it was impliedly affirmed. *Bayley* J. I think so; and the affidavit seems to me to be sufficient. Judgment was accordingly granted.

Saturday, June 26th.

HARDEN *against* WOOD.

Notice to appear at the foot of common process, in which the defendant was called *James*, when in the former part of the writ he was called *William*, Held irregular, and the proceedings were set aside with costs. (*a*)

TINDAL moved to set aside the proceedings for irregularity, with costs, in this case, the irregularity being, that at the bottom of the writ the de-

(*a*) The words of the stat. 5 *Geo.* 2. *c.* 27. *s.* 4. are as follows:—"And be it further enacted, that upon every copy of such process to be served upon any defendant, shall be written in like manner an *English* notice to such defendant of the intent and meaning of such service, and to the effect following, viz. *A. B.* you are served with this process to the intent that

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fendant was directed to appear by the name of *James Wood*, and in the previous part of the writ he was described by the name of *William Wood*.

The COURT held this an irregularity, and no cause being afterwards shewn, the rule was made absolute.

you may by your attorney appear in his Majesty's Court of —— at the return thereof, being the —— day of —— (as the case shall happen to be) in order to your defence in this action." In *Jones* v. *Armytage*, 2 *B.* & *P.* 38. where the defendant had been served with a copy of the process and notice to appear, and in the copy of the writ the defendant was called *William Armytage*, which was his proper name, but the notice was "*Catherine Waller*, you are served," &c. The Court were of opinion that the mistake was fatal, and made the rule absolute for setting aside the proceedings. It is clear that the name of the defendant must be inserted, or the proceedings will be irregular. *Worgman* v. *Plank*, 1 *Hen. Bla.* 100; *Behema* v. *James*, 1 *Wils.* 104, S. P. So it is irregular where the notice is directed by mistake to the plaintiff instead of the defendant. *Cromwell* v. *Goodwin*, *Barnes*, 409; *Tidd*, 6th ed. 168, 9.

ANONYMOUS.

Saturday, June 26th.

Trover lies at the suit of one of the makers of a promissory note, especially if the other maker signed as surety. (a)

TROVER for a promissory note given by the plaintiff to the defendant. Plea not guilty.

At the trial before RICHARDS C. B. at the last Assizes for the county of *York*, it was objected on the part of the defendant that the action should have been brought in the name of another person as well as that of the plaintiff, it appearing that the former had subscribed his name to the note as guarantee or surety for the plaintiff. But the objection being overruled, the plaintiff had a verdict.

Raine, in shewing cause against a rule obtained last

(a) Vide *Watson* v. *King*, 4 *Campb.* 272; 1 *Stark*, 121, S. C.; *Bloxam* v. *Hubbard*, 5 *East*, 407; *Heath* v. *Hubbard*, 4 *East*, 110; *Addison* v. *Overend*, 6 T. R. 766; *Sedgworth* v. *Overend*, 7 T. R. 279. The last two cases establish, that if one of several owners of a personal chattel bring an action for a tort for an injury thereto, the defendant must plead the nonjoinder of the other owners in abatement.

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Term, for setting aside the verdict and entering a nonsuit, was stopped by the Court.

Pullock Serjeant, in support of the rule, contended that the objection taken at the trial was fatal, insisting that the other party to the note should have been joined in the action. *Sed*

PER CURIAM. The action is well brought in the name of the plaintiff only, because he appears to be the principal debtor. This is not a joint promissory note; it is a promise to pay by the plaintiff alone, and the name of the other party is only added as a surety; but even if they were both to be considered as debtors, the objection would not be good, because either might declare singly, and at most the objection should have been pleaded in abatement, and was no ground of nonsuit.

Rule discharged.

Monday, June 28th.

SLADE'S *Bail*.

Bail cannot justify as a housekeeper if he occupy every room in a house under a lease, except one, which is reserved for his landlord, who pays all the taxes.(*a*)

ONE of the bail in this case offered to justify as a housekeeper, and it appeared that he occupied every room in the house where he lived, with the exception

Bail rejected who had rented a house, and underlet the same to another who paid the taxes, and let first floor to the bail, but whom landlord would not accept as a tenant, and therefore he paid the full rent to the bail, who paid it over to the landlord.

(*a*) See *Bold's* Bail, *ante* 288; *Walker's* Bail, *ante* 316. See also *Anon. Mich.* T. 1816. *Spankie* opposed the justification of bail, who had some time ago taken a house, which he afterwards underlet to another whom the landlord refused to accept as a tenant. The under-tenant paid the taxes, and let to the bail the first floor of the house. The under-tenant paid the rent for the whole house to the bail, who paid it over to the landlord. It was contended that this bail was not a housekeeper, and *Bayley* J. held that he ought to be rejected.

It has been held however in the Court of Exchequer, that a person employed by the commissioners in the repair of water-works, who is allowed a house to live in during the period of his employment, for which he pays no rent or taxes, may be allowed to justify as bail. *Williams* v. *Dethick*, 2 *Price*, 8.

of one in which his landlord lived; that he had a lease of the premises, but that his landlord paid the taxes.

BAYLEY J. said, that under these circumstances the party could not be considered as the housekeeper, but gave time to add and justify other bail.

E. Lawes for the plaintiff, and *Espinasse* for the defendant.

TAYLOR'S *Bail.*

Monday, June 28th.

Notice of bail residing in *Cannon Street Road*, which is nearly a mile in length, without giving any number of the house, held sufficient, when it was sworn that the plaintiff had found the bail, so as to serve him with process.(a)

THE notice of justification of one of the bail in this case described the party as *A. B.* of *Cannon Street Road*, without any number of the house in which he lived, it being admitted that *Cannon Street Road* was nearly a mile in length.

Hutchinson for the plaintiff, objected that this notice was too general.

Comyn insisted that it was sufficient, particularly after the plaintiff had found means of serving the bail with process on the bail-bond, which fact was sworn to in the affidavit.

BAYLEY J. was of opinion, under these circumstances, that the objection was not well founded, and therefore permitted the bail to justify.

(a) See *Wells's* Bail, *ante* 493, and other cases in notes to *Jackson's* Bail, —— v. *Costar*, 5 *Taunt.* 554.

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Monday, June 28th.

The Court will not grant a rule to dispense with personal service

CURWOOD moved for a rule to shew cause why personal service upon the defendant of the master's *allocatur* of the costs of the day for not proceed-

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of the master's *allocatur* for costs, with a view to an attachment, on an affidavit that the defendant keeps out of the way to avoid being served. (*a*)

ing to trial, should not be dispensed with, on an affidavit stating that the defendant kept himself within doors in order to avoid personal service of the process, and had been seen by his neighbours during the days when the deponent called at his house to serve him with the process. The affidavits of the neighbours did not state that they saw the defendant in his house at the very hour that the party called to serve him with the *allocatur*.

ABBOTT C. J. As this motion is probably made as a previous step to a motion for an attachment, and may be considered in principle the same, I think we cannot dispense with personal service. I know of no instance of a similar application; and unless some authority is cited to support it, I think we ought not to establish a precedent, pregnant with such serious consequences. This is not merely the case of a person keeping out of the way to avoid the service of a rule, but it is to avoid a demand of money, which is an antecedent step to an attachment. I am not aware that the Court ever dispensed with personal service in such a case, and as no authority is cited I think we ought not to grant the rule. I know that in a very strong case from *Salisbury*, the Court refused a similar application. I recollect an instance of a person who carried a power of attorney in his pocket for many months, in expectation of meeting a man of whom it was necessary to make a personal demand of money, and at length he succeeded in his object.

Rule refused.

(*a*) See as to personal service of an ejectment, where the affidavit states the deponent's belief that the tenant kept out of the way to avoid being served, *Doe* v. *Roe*, *post*, 505, 506; and as to personal service of notices, &c. where the person to be served keeps out of the way to avoid being served, *Tidd*, 6th ed. 62. And see as to the personal service necessary before moving for an attachment, *Tidd*, 6th ed. 811.

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Monday, June 28th.

DOE *on the demise of* LOVELL *against* ROE.

In ejectment for a stable service of the declaration, by nailing it to the door of the stable, no person being therein, and then going to the defendant's house and informing him of what had been done, held insufficient to ground a rule that the service be deemed good. (*a*)

TINDAL moved for a rule to shew cause why the service of the declaration in ejectment in this case should not be deemed good service. The pre-

Declaration in ejectment stuck up on the gateway of the tenant's premises is not sufficient, unless it be sworn that the defendant kept out of the way.

In order to ground a rule that service may be deemed good, it is not sufficient to show that the lessor of the plaintiff had been unsuccessful in two attempts to find the defendant at his dwelling-house, and had therefore stuck up the declaration on the premises.

Affidavit of service of declaration, where tenant had left premises, not stating that the lessor, &c. did not know where he was, not sufficient.

Affidavit to ground a motion for judgment against the casual eject

(*a*) See next case. It is not sufficient that a notice should have been stuck up on the gateway of premises, where it is not sworn that the defendant keeps out of the way. *Anonymous, Trin.* T. 1814. *June* 22d. *Hullock* moved for judgment against the casual ejector, on an affidavit that the declaration had been stuck up on the gateway of the premises; but not swearing that the defendant was out of the way, &c. the *Court* held it insufficient. Rule refused.

So it is not sufficient to state that the deponent had called at the tenant's house in the morning and again in the evening, and not finding the defendant at home, had nailed the declaration on the most conspicuous part of the premises. *Anon. Trin.* T. 22 *June*, 1813. *Tindal* moved for a rule to shew cause why the service of a declaration in ejectment should not be deemed sufficient, on the ground that the person serving the declaration had called at the house of the tenant in the morning, and again in the evening, and not finding him at home either time, he nailed the declaration up on the most conspicuous part of the premises. *Le Blanc* J. held that this was insufficient; the case must be carried farther. It should be shewn that the lessor of the plaintiff had done all in his power, and that otherwise the learned Counsel must take nothing by his motion.

In order to dispense with personal service of a declaration in ejectment, it ought to appear that the tenant keeps out of the way to avoid being served, and the deponent's belief of that fact should be stated. *Anon. Trin.* T. *Wednesday, June* 23, A. D. 1813. *Barlow* moved that service of declaration in ejectment might be deemed good service, and the service of rule *nisi* also. The affidavit stated that the tenant had deserted the premises 15 months, and that the declaration had been served on the tenant's servant-maid on the premises, and that the nature of the declaration had been explained to her; but did not go on to state, that they had searched for the tenant and did not find him, and that they did not know where he was to be met with, and that they believed he kept out of the way to avoid being served. *Bayley* J. said it was not sufficient.

See also *Doe* ex dem. *Lowe* v. *Roe, East.* T. 1814, *April* 14th. *Cross* moved for judgment against the casual ejector, on an affidavit that the declaration had been stuck upon the house, there being nobody in it, and the neighbours believing that the tenant in possession had absconded, —the affidavit did not state the deponent's belief of the defendant's keeping out of the way to avoid the service. *Dampier* J. It is not sufficient to entitle you to sign judgment, that nobody is in the house. If the

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Doe *against* Roe.

mises mentioned in the declaration were stables, and the deponent went to the premises to serve the declaration, but finding no person in possession he nailed a copy of the declaration against the door, and then went to the dwelling house of the defendant, and informed him what he had done. The *Court* said this affidavit was not sufficient even for a rule to shew cause, because the deponent had not done what he might reasonably be expected to do for the purpose of properly serving the declaration.

Rule refused.

or, where no one was in the house, and the declaration was stuck up thereon, must state the deponent's belief, that the the party absconded with a view to avoid the service.

possession is actually vacant, you must proceed as such; but on decided cases almost any thing in the house will prevent it,—as, small beer being in a cellar, 2 *Stra.* 1064; or hay in a barn. Besides, your affidavit to ground this motion should state the deponent's belief that the tenant kept out of the way, or absconded, for the purpose of avoiding the service. Rule refused.

Wednesday, June 16th.

Doe *dem.* Tarluy *against* Roe.

The affidavit upon which to move for judgment against casual ejector, where the tenant has absconded, must state that the copy of declaration was *left* as well as affixed on the premises, and that the deponent has used due means to find out such tenant's residence, and verily believes he has absconded. (*a*)

COMYN moved for a rule *nisi* for judgment against casual ejector, and that rule might be served in the same manner as the declaration, upon an affidavit stating that the tenant in possession had absconded to avoid arrest, and that the declaration was nailed upon the outer door of the house.

Bayley J. You ought to have shewn that you *left* the declaration there. Upon amending your affidavit, you may take a rule *nisi*, and you may affix the rule *nisi* in the same way.

Comyn accordingly obtained a fresh affidavit, stating, "That deponent did on, &c. affix and leave on the outside of the street door of the messuage and pre-

(*a*) See the notes to the last case.

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DOE *against* ROE.

mises in declaration mentioned, a true copy of the declaration hereunto annexed, and notice thereunder written; the same messuage being entirely shut up and deserted. And this deponent further saith, that he has made diligent inquiry after *John Dixon*, the late tenant in possession of the said premises, and whom this deponent hath been informed and verily believes is possessed of the lease thereof, but this deponent doth not know, nor can he learn where he now resides or can be found, so as to serve him with a copy of the said declaration and notice, but this deponent verily believes that he has absconded to avoid being arrested for debt." Upon this affidavit a rule *nisi* was obtained.

WALTERS *against* MACE.

Monday, June 28th.

Where the declaration stated that defendant went before "R. C. Baron of *Waterfork*, in the county of, &c. and charged plaintiff with felony, &c." and it was proved that the title of the magistrate was "R. C. Baron of *Waterpark*, in the county, &c." Held, that this was a fatal variance. (*a*)

ACTION against the defendant for maliciously charging the plaintiff with felony, and obtaining a warrant and imprisoning him and causing him to be examined before a justice of the peace; with a count,

(*a*) In *Abitbol* v. *Bristow*, 2 *Marsh.* Rep. 159. a case is mentioned by *Gibbs* C. J. in which Lord *Kenyon* ruled in an action for medicines alleged to have been furnished to the defendant's wife *Mary*, that the delivery to his wife *Elizabeth* might be proved, the defendant's wife being the material word. See also *Purcell* v. *Macnamara*, as cited by *Lawrence* J. 9 *East.* 163. But the misnomer of a third person is in general fatal. *Keen* v. *Dormay*, 15 *East*, 161; *Hutchinson* v. *Piper*, 4 *Taunt.* 810. *Willes'* Rep. 8. though the misnomer of one of the parties sued is not material on the general issue, where the identity is proved. *Dickenson* v. *Bowes*, 16 *East*, 110. See also 1 *Stark.* 47. where a variance was discovered between the name of one of the indorsers as it was stated in the declaration, and the name which appeared upon the bill, the name being in the one place *Phillip Phillips* and in the other *Phillip Phillip*, and it was held immaterial. In the case of *Blackmore* v. *Flemyng*, 7 T. R. 446. where an action was brought on a judgment and *nul tiel* record was pleaded, and on the day given to produce the record it appeared that in the former cause the defendant was sued as the Right Honourable *Hamilton Flemyng* Earl of *Wigtown*, having

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Where the declaration stated that the defendant spoke these words of the plaintiff: "*This* is my umbrella and he stole it, &c." Held, that this was not supported by proof of the words "*It* is my umbrella and he stole it, &c." the umbrella not being present. (*b*)

for words imputing felony. The first and second counts of the declaration alleged, that the defendant went before *Richard Cavendish, Baron Waterpark* of WATERFORK in the county of *Cork*, in the kingdom of *Ireland*, being a Justice of the Peace in and for the county, and maliciously and without any reasonable or probable cause, charged the plaintiff with felony and obtained a warrant under which he was arrested and examined before the said justice upon the said charge of felony. The third count alleged that the defendant spoke the following words of slander, of and concerning the plaintiff. "*This* is my umbrella and he stole it from my back-door," and special damages were laid. At the trial before GARROW B. at the last Assizes for the

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privilege of peerage, and in this action he was called *Hamilton Flemyng* Esquire commonly called Earl of *Wigtown*, without noticing that the first action was brought against him as a peer, this was held to be a failure of record, and leave was given to the plaintiff to amend his declaration on payment of costs, and the defendant to be at liberty to plead *de novo.* But in the case of Lord *Suffield* v. *Bruce*, 2 *Stark.* 176. where it appeared on the production of the record described in the declaration, that the defendant was styled in that record Baron *Suffield*, but in the allegation in present action he was described as the Right Honourable the Earl of *Suffield*, Lord *Ellenborough* overruled the objection on its being answered on the part of the plaintiff that it would be proved that both names were intended to apply to the same person. See also the *King* v. ——, which is cited 9 *East*, 163. In the case of *Doe* on the dem. of the Mayor, Aldermen, Capital Burgesses and Commonalty of *Malden* v. *Miller*, 1 *Barn.* & *Ald.* 699. where a demise was laid by the mayor, aldermen, &c. of the *borough town* of *Malden*, and it appeared on the trial that the name of the corporation according to the charter was "the Mayor, &c. of *M.*" without the words Borough Town; it was held that this was no variance, as it appeared from the charter which was in evidence that *Malden* was a borough town: and it was held to be no variance that the name was called *Maldon* instead of *Malden*, the two words being *idem sonans.*

(*b*) So if the words be laid in the third person, as "He deserves to be hanged for a note he forged on A." proof of words spoken in the second person, as "You deserve, &c." will not support the declaration; for there is a great difference in the effect produced by the two modes of expression. *Avarillo* v. *Rogers*, *Buller Pri.* 5. The same point has been held on an indictment for speaking words of a justice of the peace, where the words spoken were "*you* are a perjured justice, &c." and the words charged in the indictment to have been spoken were "*he is* a perjured justice, &c." The *King* v. *Berry*, 4 T. R. 217. So it has been

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county of *Stafford*, Lord *Waterpark* being examined as a witness in support of the first and second counts of the declaration, stated that his proper names and titles were *Richard Cavendish, Baron Waterpark* of *Waterpark* in the county of *Cork* in the kingdom of *Ireland*, and not *Baron Waterpark* of *Waterfork*. In support of the count for slander the words proved were these. "*It* is my umbrella and he stole it from my back-door." It was objected at the trial that these were fatal variances; first, because there was no such person in existence as *Richard Cavendish, Baron Waterpark* of *Waterfork* in the county of *Cork* in the kingdom of *Ireland*; and secondly, that the words, "*It* is my umbrella"—were very different in sense and meaning from the words "*This* is my umbrella;" it appearing in evidence that the umbrella which the plaintiff was alleged to have stolen was not present at the time the words were spoken. The learned Judge acquiesced in both objections, and directed a nonsuit.

W. E. Taunton last Term obtained a rule *nisi* for

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holden, that a count for words spoken affirmatively is not supported by proof that they were spoken by way of interrogation. *Barnes* v. *Holloway*, 8 T. R. 150. But when the effect of the words is stated in the declaration it is not always essential that the identical expressions should be set forth: as when the words laid in the declaration were, "You are a thief, you stole *one of* my sheep and killed it," and the words as proved in evidence were, "You stole my sheep and killed it," and this was objected to as a material variance, Lord *Ellenborough* overruled the objection, observing that the words "you killed it" shewed that one sheep only was meant. *Robinson* v. *Willis*, 2 *Stark.* 194. Where the words laid in the declaration were "she is a great thief, she ought to have been transported, it was held that these words were not proved in substance by the words "she is a bad [illegible], she ought to have been transported." *Hancock* v. *Winter*, 7 *Taunt.* 205; 2 *Marsh.* 502, S. C. The particular expression must be set forth in the declaration; and a general statement that the defendant charged the plaintiff *with being in insolvent circumstances*, or in such general terms, will be bad even after verdict. *Cook* v. *Cox*, 3 *M.* & *S.* 110; 6 *Taunt.* 169. Hence it seems material that the words should be stated with precision; and the smallest variation, even in a letter, if it alter the meaning of the words employed, will be a fatal objection.

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setting aside the nonsuit and obtaining a new trial, and *Jervis* now shewed cause; but the Court called on *Taunton* to support his rule; and taking the second objection first, he urged that the plaintiff was not tied down to any particular umbrella alleged to have been stolen. It must be taken that the words set forth in the declaration were a substantive charge and imputation of felony. If so, the words proved in evidence to have been spoken supported the substantive charge, and it signified nothing whether the article charged to have been stolen was present or absent at the time the slander was uttered. It was not the less an imputation of felony, because the article was not present, the substance of the charge in issue being proved. The case of *Hall* v. *Smith*, (*a*) is precisely in point: there the plaintiff declared that he had been a wool-stapler at *Cirencester*, and was a Brewer at *Oxford*, and that the defendant spoke of him as such trader these words: " Mr. *Hall* and Mr. *Brooks* have both been bankrupts, and Mr. *Hall* at *Cirencester*," and gave no evidence of his having been a wool-stapler, but only that he was a brewer at *Oxford*, and proved the words spoken to have been these, " He was a bankrupt at *Cirencester*, &c." and the Court held that this proof sustained the allegation that the words were spoken of him in his trade of a brewer, for a trader at *Oxford* may be a bankrupt at *Cirencester*. In that case, the words proved did not relate to either of the trades, but inasmuch as the gravamen of the charge was that the plaintiff was a bankrupt, the Court was of opinion that the words were substantially proved. So in the present case, the gravamen of the charge is that the plaintiff stole an umbrella, and it is of no importance, with reference to that charge, whether the words be, " *This* is my umbrella," or " *It* is my umbrella, and the defendant has stolen it," the variance

(*a*) 1 *M.* & *S.* 287.

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being wholly immaterial. As to the second point, the variance between *Waterpark* and *Waterfork* is also altogether immaterial, because the description of the titles of the magistrate, before whom the charge of felony was made, is only matter of inducement in the declaration, and at all events the words "*Baron Waterpark* of *Waterfork* in the county of *Cork* in the kingdom of *Ireland*," are only surplusage, and need not have been set out; for most certainly if it had been said that the defendant appeared before one *Richard Cavendish* Baron of *Waterpark*, that would have been a sufficient description of the noble Lord, because it would be giving him the title by which he was usually known in the world, and it was not necessary to go on and state the name of the place from which he took his title. The case of *Alcorn* v. *Westbrook*, (*a*) goes much beyond this. That was an action on the case, upon a promise to deliver up a bond, whereby one Lord Viscount *Gave* became bound to the plaintiff's testator in the sum of 300*l*. and it was objected that the bond was not rightly described in the declaration, for there it was Lord Viscount *Gave*, whereas the bond deposited and proved to be demanded was entered into by Lord Viscount *Gage*; but the Court after taking time to consider of the case, in the result they were unanimously of opinion that the action was well laid, for the word *Gave* was only surplusage. [BAYLEY J. He was rightly called in other parts of the record and in other parts of the bond, as the bond was set out, and therefore the Court considered that there being two inconsistent parties to the bond, they were at liberty to reject the name of *Gave* as surplusage]. The proof of all the titles of the magistrate described in the declaration is no part of the plaintiff's case, nor could the plaintiff be required strictly to prove them. At the trial there

(*a*) 1 *Wils.* 115.

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was no inquiry made whether there was any other noble Lord of the same name, nor whether *Waterfork* was the real place of his residence, and *non constat*, but the noble Lord lived at a place called *Waterfork*. It was not necessary that the plaintiff should set out the noble Lord's titles with that sort of certainty that was to be found in his patent. He then referred to the following case, which was stated to have occurred a few years ago: the defendant demurred to a declaration, which began in the following manner, "*J. N.* commonly called *G. N.* of *C. D.* in the county of so and so;" and the counsel in support of the demurrer contended that the *alias dictum* ought to be put after the description of the place, urging that the rule of law was, that where a person is described with an *alias*, it ought to be after the full description of the name which preceded it; and the Court on that occasion said, "We are not to presume but that the man was christened by the whole name set out." Mr. Baron *Wood* argued the demurrer, and his objection was met by this observation: "If there be any possible case in which the plaintiff is right, you are wrong, for there is nothing to shew, but that the man may have been christened by the whole name however nonsensical it may appear, and we will not presume that the plaintiff is wrong, until you shew that he is." (a) So here,

"*Henry Prevost* late of *London* merchant otherwise called *Henri Prevost*," held a good description of defendant, in a plea in abatement.

(a) Vide *Scott* v. *Soans*, 3 *East*. 111, where it was held that the defendant's being sued by the name of *Jonathan* otherwise *John Soans*, is no cause of demurrer to the declaration, for it should be intended that *Jonathan* otherwise *John* was all one Christian name. But where a defendant was sued as *Henry Prevost* late of *London* merchant otherwise called *Henri Prevost*, and the defendant pleaded in abatement that he was baptized by the name of *Henri* and was always called by the Christian name of *Henry Prevost* otherwise called *Henri Prevost*, the plea was holden bad upon demurrer. *Caumont* v. *Prevost*, *Trin*. T. 1816. *June* 20th. The defendant was stiled in the commencement of the declaration *Henry Prevost* late of *London* merchant otherwise called *Henri Prevost*. In the rest of the declaration, he was alluded to by the term, the said defendant. Plea in abatement, that the defendant was baptized in the name of *Henri* and was

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in the absence of all evidence, the Court will presume that lord *Waterpark* lived at *Waterfork*. In the case of the *King* v. *Lookup*, referred to in *Purcell* v. *Macnamara* (*a*) which was an indictment for perjury assigned upon an answer filed to a bill in Chancery, it appeared that the indictment stated the bill to be directed to Robert Lord *Henley*, &c. whereas in fact it was directed to Sir Robert *Henley*, Kt, &c., and it being objected that this was a variance, the Court over-ruled the objection. [HOLROYD J. The way that case is to be understood is this—that the bill was alleged to be directed to *Robert* Lord *Henley*, though in fact the bill was directed to Sir *Robert Henley*, who at the time of the indictment was created a peer. The allegation was true; and there being sufficient certainty in the evidence that there was no other *Robert* Lord *Henley*, proof that it was presented to Sir *Robert Henley*, who had been Chancellor but had in the mean time been created a peer, was held sufficient. That is the way I have always understood that case. BEST J. He was described *Robert* Lord *Henley*, Keeper of the Great Seal, and there was no other *Robert* Lord *Henley* proved to be in existence at the trial. Now there may

always called by the Christian name of *Henry Prevost* otherwise called *Henri Prevost*. General demurrer. The following cases were cited: *Griffith* v. *Middleton*, *Cro. Jac.* 425. where it was held that *Piers* was to be considered the same name as *Peter*: and the Ch. J. said that where one was sued by the name of *Sanders* and his name was *Alexander*, yet it was held to be well enough; and that *Joan* and *Jane* are but one name, although *Agneis* and *Ann Gillian* and *Julian*, are all different names. *Downes* v. *Hathway*, 2 *Roll.* Abr. 136. pl. 11; *Evans* v. *King*, *Willes*, 554; *Scott* v. *Soans*, 3 *East*, 111. *Bayley* J. In the case of *Scott* v. *Soans*, the Court only said he might be called by that name; and here there are other words interposed—*Henry Prevost* late of *London* merchant, which we cannot take as part of the Christian name; and it is also *Henry* otherwise called *Henri*, which a man may be; he cannot have two Christian names, but he may be called by two names. Lord *Ellenborough* Ch. J. It is impossible to incorporate the whole description as a Christian name. —— late of *London* merchant, that is against all sense.—Judgment for the plaintiff.

(*a*) 9 *East*, 157.

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be another Lord *Waterpark* in existence.] It lies upon the defendant to prove that. [ABBOTT C. J. You are to make out your case. You are to prove that the defendant went before a justice of the peace for the county of *Stafford* of the name of Baron *Waterpark of Waterfork*. Now you have never proved that his name is Baron *Waterpark of Waterfork*. It is the place that gives the title; and you have not proved that his residence was at a place called *Waterfork*.] The noble Lord in this case is described in the declaration as being one of his Majesty's Justices of the Peace in and for the county of *Stafford*; and all that is necessary to shew is, that he is the person meant. [BEST J. This is not like the case of the *King* v. *Lookup*, because there is only one Lord Keeper of the Great Seal, whereas there may be an hundred Magistrates in the county of *Stafford*.] Still it resolves itself into a question of identity; and the only point is, whether this was the person *bonâ fide* intended by the declaration, the noble Lord's title not being at all material. [ABBOTT C. J. The true description of the place from which a nobleman takes his title is of the utmost importance, because it is the description of a name of dignity, and is the only means of distinguishing the title of the party, as matter of identity, because there may be several noblemen of the same name. To illustrate this, there is Lord *Douglas* of *Douglas*, and Lord *Douglas* of *Lochleven*; Lord *Grey de Willoughby*, and another Lord *Grey* of some other description; and so of several other noblemen.] But if it is a question of identity the objection to the description may be cured by evidence. The case of *Purcell* v. *Macnamara* (*a*) in principle was in favor of this argument. Under these circumstances it was submitted, that the nonsuit ought to be set aside and a new trial granted.

(*a*) 9 *East*, 157.

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ABBOTT C. J. I think the nonsuit was right on both grounds. It appears to me that we must understand the allegation in this declaration, that the defendant went before *Richard Cavendish, Baron Waterpark* of *Waterfork* in the county of *Cork* in the kingdom of *Ireland*, as containing the description of the name of dignity of the person before whom the defendant went to prefer the charge which is the subject of the action. It infers that he did not go before any person whose name was *Richard Cavendish*, and whose title of dignity was *Baron Waterpark*, of *Waterpark*, but *Richard Cavendish, Baron* of *Waterfork*, and that it must be understood to mean a different person from that intended in this declaration. As to the second point, I am of opinion, that the variance from the word *this*, as introduced into the declaration, is fatal. The words set forth in the declaration are these: "*This* is my umbrella, and he stole it from my back-door." The words proved are, "*It* is my umbrella, and he stole it from my back-door." Now although the exact words need not generally be proved, yet it is necessary that they should be substantially proved; here the words are not substantially proved. The word *this* has reference to something supposed to be *present*; the phrase *it*, is equivocal: it may be used of a thing present, or absent; as for instance, if used in this way, "whose is *this*?"—"*It* is my umbrella,"—or "what is this?" "*It* is my umbrella." In the way in which the words are alleged in the declaration, the party is supposed to be speaking of a thing actually present. If the umbrella had been proved to be present at the time of the conversation, though the defendant spoke of it in the way proved, I should have thought it not necessary to prove the words exactly as they are laid; but the umbrella was not present, and therefore the word *it*, as proved, must be understood to have been used with reference to something absent, whereas the declaration alleges the words to have been spoken of something present. As the words proved do

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not shew that the defendant was speaking of something present, I think the word *it* is a material variance from the declaration, and consequently on both grounds this nonsuit is right.

HOLROYD J. (*a*) It appears to me also that the nonsuit is right, though I regret the necessity of deciding that the party should be nonsuited upon variances of this kind. But the plaintiff by making his election to declare that the defendant appeared before a particular person, giving that person a certain specific description in the declaration, is bound to prove it strictly; having misdescribed him, he does not prove that the defendant appeared before the person whom he alleges in his declaration that he did appear before. With respect to the other objection, as to the variance between the words, "*This* is my umbrella, and he stole it from my back-door;" and "*It* is my umbrella, and he stole it from my back-door," I think that is a variance which we cannot get over, because the words as laid in the declaration import a thing which is present, whereas the words proved to have been spoken had reference to a thing absent; we cannot say that they are substantially the same words, however they might be if the umbrella had been present. If at the time the words were used, the umbrella was in fact present, I should be of opinion that those words would be sufficient to satisfy the declaration; but inasmuch as it was absent, and the declaration speaks of it as being present, I am of opinion that they were not the words described in the declaration. It appears to me therefore, that acting upon the rules of law we are bound to sustain this nonsuit.

BEST J. It is impossible to say, that "*Baron Waterpark* of *Waterfork*," can be construed into a suffi-

(*a*) BAYLEY J. had left the Court.

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cient description of the place from whence the noble Lord takes his title. The description given is a description of part of the noble Lord's title, because he takes the title from the place in which he was born, or where his property is situated, his title being *Baron Waterpark* of *Waterpark*. In the same way we speak of Earl of such a place, and Duke of such a place, which imports the honor which has been conferred by the King upon the party. It is part of the title, when you say a man is Earl or Duke of *such a place*. In this case, there being a misdescription of the noble Lord, in calling him *Baron Waterpark* of *Waterfork*, instead of *Waterpark*, I think it is impossible to get over the objection. As to the second objection, there is a manifest difference between *this* and *it*. When the defendant says "*It* is my umbrella," he is speaking of something that is absent, whereas the words in the declaration have reference to something present at the time they were spoken. The case of *Hall* v. *Smith* (*a*) is distinguishable from the present, because that did not proceed upon any supposed difference between the words laid and the words proved, but whether the words were properly introduced and proved with reference to the gravamen of the charge, the defendant there having spoken of the plaintiff in allusion to his trade. The words proved in that case were sufficient for the purpose of shewing that they were spoken of the plaintiff in his trade; for whether he spoke of his trade at *Oxford* or elsewhere, was a matter quite immaterial, because the foundation of the action was the slander upon him as a tradesman, and the law would supply the defect in the proof of the precise words; but the case is very different when you come to speak of the meaning of the words. I am of opinion that the words set out in this declaration are very different from the words proved, and therefore I think the nonsuit right.

Rule discharged.

(*a*) 1 *M. & S.* 287.

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Monday, June 28th.

SWALLOW *against* BEAUMONT.

In covenant, where in setting out the deed, the declaration stated that "it was witnessed amongst other things, that as well in consideration of, &c." and part of the considerations omitted, and there was no word in the declaration to answer to the phrase, as well; Held, that this was a fatal variance. (*a*)

ACTION of covenant. The declaration set forth the deed in the following manner, viz.—" It was witnessed amongst other things, that *as well* for and in consideration of the sums of money which the said plaintiff had already expended in erecting a steam-engine, a blasting furnace, and other buildings requisite and necessary for the purpose of smelting iron ore, pig ore, &c. in *Dovecoat* close, and other closes therein after expressed."—At this word, the statement of the consideration concluded, and there was nothing in the declaration to answer to the words *as well*. Plea, *non est factum*. At the trial before RICHARDS C. B. at the last Assizes for the county of *York*, on the production of the deed, the consideration therein expressed was this: " It is witnessed as well in consi-

(*a*) Vide *Knill* v. *Williams*, 10 *East*, 431; *Howell* v. *Richards*, 11 *East*, 633; *Horsefall* v. *Testar*, 7 *Taunt.* 385; *Tempany* v. *Burnand*, 4 *Campb.* 20; *Gordon* v. *Gordon*, 1 *Stark.* 294; *Boulditch* v. *Mawley*, 1 *Campb.* 195; 6 *Taunt.* 394; 2 *Marsh.* Rep. 96; *Morgan* v. *Edwards*; *Hoar* v. *Mill*, 4 *M.* & *S.* 470. The case of *Hanborough* v. *Wilkie*, acording to a MS. note, was as follows:—*Hanborough* v. *Wilkie*, *Thursday*, *Jan.* 26, *Hil.* T. 1815. Action of covenant by the mortgagee against the mortgagor, for not paying mortgage money. On the trial, an objection was raised by *Comyn* on the ground of a variance, it being alleged in the declaration, that by the deed the defendant bound himself, *his heirs* executors and administrators. Whereas the terms of the covenant only extended the obligation to the defendant, his executors and adminstrators, and did not expressly include the defendant's heirs. A verdict was obtained for the plaintiff. And it was now moved to set aside this verdict, and to enter a nonsuit. It was urged by *Comyn*, that though the allegation might be immaterial and unnecessary to have been stated, yet having been stated it must be proved; and that there were many cases in which much smaller variances had been held fatal. *Bristow* v. *Wright*, *Dougl.* 665. was cited. Lord *Ellenborough* Ch. J. The heirs would be equally bound whether mentioned or not. It was unnecessary to state whether the heirs were or were not bound. *Bayley* J. This was a totally immaterial part of the deed to state. The statement is immaterial in this case, and can have no future effect on the heir. *Le Blanc* J. Nor on these parties. Rule refused. See 4 *M.* & *S.* 472, 3.

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deration of the sums of money which the said plaintiff has already expended in the erecting and building a steam-engine, blasting furnace, and other buildings requisite and necessary for the purpose of smelting iron ore, pig ore, &c. in *Dovecoat* close, and other closes, &c. *and also in erecting and buildiug ten dwelling-houses in the said closes.*" It was objected, that this was a variance, and that the whole of the consideration had not been set out, because there was nothing to satisfy the words *as well*, the introduction of which rendered it necessary to set forth the remaining part of the consideration expressed in the deed. The Chief Baron thought the objection fatal, and directed a nonsuit.

Littledale last Term moved to set aside the nonsuit and obtain a new trial, contending that this was not a fatal variance, and that the words "as well" might be rejected as surplusage.

Scarlett and *Tindal* now shewed cause. It is clear, that the deed sets forth two parts of one entire consideration; first, as to the money expended in erecting and building blasting furnaces, and other buildings for the purpose, &c.; secondly, and also in erecting and building ten dwelling-houses in the said closes. The declaration, therefore, in setting out the consideration, had not set it out truly, which it ought to have done, in consequence of the introduction of the words "as well," which import something more than what appears upon the face of the declaration, for there is nothing to correspond with those words. The deed set forth in the declaration does not witness the same consideration as that stated in the deed itself; and the plaintiff having tied himself up to state the whole of the consideration, by introducing the words *as well*, he fails in making out his case, unless he introduces

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something farther to satisfy those words. It could not be denied, that in general where a party brings an action of covenant, the party may state in his declaration sufficient only to meet the precise breach of which he complains, as that the defendant, amongst other things, in consideration of any particular thing, entered into a certain covenant; but where the plaintiff professes to set out the whole of the consideration and covenant, he must set them out truly. On the face of this declaration, the words *as well* being introduced, it imports two distinct parts of one consideration, but in fact there is only one part set out. It was not incumbent on the plaintiff to set out the whole of the irrelevant parts of the consideration, but if he professes to set them out, he is bound to set them out correctly. The simple question here is, whether the introductory part of the declaration reciting the deed, does not give the Court to understand that there is some other part of the consideration which the plaintiff has not stated in his declaration. If this be so, there is an obvious and material variance between the declaration and the deed. It is necessary to look at the instrument itself, in order to make the declaration intelligible, and consequently the variance is material. The Court cannot reject the words, *as well*, in order to make the deed set out intelligible, because in doing so they must reject from the consideration of the jury an important part of the case; but even if they were rejected, that would not cure the objection, because it would still appear that the covenant was entered into not solely for the consideration mentioned in the declaration, but in consideration of that thing and another. For these reasons, the variance is obviously fatal.

Littledale, *J. Williams*, and *F. Pollock*, in support of the rule. In this case, the whole of the considera-

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tion may be treated as surplusage; but in all events, the words *as well* may be struck out on that ground, in order to make the declaration sufficient for the purpose of this action. The whole of the consideration might be referred to the Master to strike it out as surplusage. It is not usual, certainly, to refer declarations to the Master to strike out superfluous matter, because the recitals of consideration do not generally run to a very great length; but it is clear that they might be so referred for the same reason that declarations are sent to the Master to strike out superfluous counts. *Dundas* v. Lord *Weymouth*, (*a*) *Price* v. *Fletcher*, (*b*) [ABBOTT C. J. One of the evils of inserting too much in a declaration is, that you may insert what you cannot maintain. Encumbering a declaration with too much matter very frequently defeats the action.] It must be admitted, that, in stating things in a declaration, they must be stated exactly as they are; that is, the plaintiff must state the subject matter of the action—the convenant and consideration, so as to complete the sense of the whole. [BAYLEY J. Must you not produce a deed corresponding with the statement in the declaration? In *Savage* v. *Smith*, (*c*) which was an action of debt against a bailiff for extorting illegal fees in executing a *fieri facias*, it was held, that if the plaintiff sets out the judgment on which the writ was founded, he must also prove it.] In the present case it is not necessary to state any part of the consideration at all, and all that has been stated may be considered as surplusage. In stating a parol contract, undoubtedly the whole of the consideration must be stated, (*d*) because, if it is not, the party does

(*a*) *Cowp.* 665. (*b*) *Id.* 727. (*c*) 2 Sir *W. Bla.* 1101.

(*d*) *Clarke* v. *Gray*, 6 *East*, 564, *per* Lord *Ellenborough*; *Miles* v. *Sheward*, 8 *East*, 7, 9, 10; *King* v. *Robinson*, *Cro. Eliz.* 79; *Bul.* Ni. Pri. 147; *Leeds* v. *Burrows*, 12 *East*, 1; *Andrews* v. *Whitehead*, 13 *East*, 102; *Symonds* v. *Carr*, 1 *Campb.* 361; 1 *Chitty* on Pl. 295.

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not present the whole of the ground upon which the action is maintainable; but in cases like the present, it is not necessary to state the whole of the contract, for a statement of the subject of the covenant is quite sufficient. Here there is a statement of the covenant, and the plaintiff is not bound to prove the consideration. In cases where it is necessary to prove consideration, they may probably admit of a different construction. Nothing is here stated, which it would be incumbent on the plaintiff to prove. If the plaintiff is not called upon to prove the consideration, he need not be tied down to a literal exposition of it. In those cases where the variances have been considered fatal, they are only those where the subject matter of the action is not correctly stated, or where there was an omission of the covenant. [ABBOTT C.J. In an action upon a covenant for the payment of rent, it is unnecessary to set forth all the particular parts of the demise; but if you do set them out at all, you must set them out correctly. *Hamborough* v. *Wilkie*, (*a*) *Bristow* v. *Wright*, (*b*) and *Hoar* v. *Mill*. (*c*) BAYLEY J. In a recent case of an action upon a bill of exchange, the declaration alleged, that the bill was drawn for value received by the drawee; and it being proved in evidence that the value was received by the drawer, the Court was of opinion that this was a fatal variance. (*d*)] These cases do not bear upon the present question, because it is not necessary to prove the consideration. The words *as well* may be altogether rejected, because they imply something else than that which is set out in the declaration. [BAYLEY J. The declaration says, "It is witnessed among other things, that for this specific consideration you covenanted so and so." Now it is not proved that

(*a*) 4 *M.* & *S.* 474, n. (*b*) *Dougl.* 664. (*c*) 4 *M.* & *S.* 470.
(*d*) *Highmore* v. *Primrose*, 5 *M.* & *S.* 65.

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you covenanted for that consideration only.] The words, *witnessed among other things*, are very loose expressions, and may have very different meanings; and if in this case they are to have any meaning, the Court must give effect to them according to the plain intention of the party. The words *as well* here must be altogether rejected as impertinent; and if the insertion is immaterial, authorities are not wanting to support this proposition. In the case of *Bristow* v. *Wright*, (a) Lord *Mansfield* said, that impertinent matter, irrelevant covenants for instance, may be rejected by the Court, and need not be proved. In all events, the question here is, whether the consideration is sufficiently stated to entitle the plaintiff to maintain this action. No person can read the consideration recited in the declaration, without being satisfied that it is at least in substance the consideration stated in the deed; for although the words *as well* might indicate that that something more was to follow, yet still the Court will not regard the recital as bad, because it does not state the whole. In this case, the plaintiff did no more than recite that part of the consideration which was witnessed among other things. The Court are not called upon to carry the words *as well* forward to the other part of the consideration; all that they are called upon is, to strike those words out as surplusage, and presume that the plaintiff intended only to recite that part of the consideration mentioned. It remains therefore for the Court to say, whether they will look at this declaration, and supply the words "and for the consideration therein mentioned," referring to the deed, which by necessary implication the plaintiff must be intended to have done, or whether they will strike out the words "as well in consideration," in order to give effect to the declaration.

(a) *Dougl.* 664.

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ABBOTT C. J. The Court having, in the course of the argument, pretty fully intimated its opinion upon this case, it is unnecessary now to enter into a detail of the reasons why they think this nonsuit is right. This declaration professes to set out the contents of the deed so far as it goes; because by stating that it was witnessed in consideration of such and such things, that bound the plaintiff to set forth correctly the substance of so much as he professed to set forth. Although he has set forth something, he has not set forth enough, because that which he has stated, he has stated incorrectly and untruly. The deed described in the declaration varies from the deed given in evidence, and for that simple reason I am of opinion that the nonsuit was right, and we are bound to give effect to that opinion; though I confess I should rather wish that an objection of this kind might not prevail.

The rest of the Court concurred.

Rule discharged.

Monday, June 28th.

IDLE *against* CRUTCH.

The Court will not grant a rule for plaintiff to sign judgment for want of a plea merely on an affidavit that the plea is false. (*a*)

ABRAHAM moved for a rule to shew cause why the plea pleaded in this case should not be set aside, and why the plaintiff should not be at liberty to sign judgment as for want of a plea. The declaration was upon a promissory note for 170*l.* with interest,

(*a*) S. P. in *Everett* v. *Wright*, 22d *Nov.* 1818. *Gurney* and *Chitty* moved for a rule, calling on the defendant to shew cause why the plaintiff should not be at liberty to sign judgment for want of a plea, upon an affidavit, stating that this was an action of debt on a bond against the defendant as an attorney, conditioned for the payment of 2000*l.*, in consideration of the plaintiff's relinquishing to the defendant certain shares in a water company, which the defendant had been instrumental in forming, and which he had actively encouraged. The defendant, besides other pleas, pleaded that the undertaking of the company was illegal, contrary to

and the defendant pleaded that he had given the note in question to one *John Thomas*, to whom alone he was

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the statute 6 *Geo.* 1. *c.* 18. *s.* 18. The plaintiff's affidavit completely, and in positive terms, falsified all the pleas, and stated that the defendant had applied for indulgence, and the deponent's belief that the same were filed for delay. It was therefore submitted, that the plaintiff ought to be permitted to sign judgment, because the pleading a plea which the party knows to be false is a great abuse of the justice of the Court; and the authorities in *Bac.* Ab. Title Pleas, G. 4, were cited and relied on. But *Abbott* Ch. J. said, that there was no ground for the application, for the Court could not try the truth of pleas upon affidavit, and that this case was very distinguishable from the instances of sham pleas tendering issues, requiring different modes of trial. *Holroyd* J. and *Best* J. concurred. The rule was therefore refused.

Where the defendant pleaded a sham plea of a judgment recovered in the Mayor's Court, it was held, that the plaintiff had no right of his own authority, and without an application to the Court, to sign judgment as for want of a plea. *Anonymous. Thursday*, 9th *Feb. Hil.* T. 1815. *Reader* shewed cause against a rule which had been obtained by *Marryat*, to set aside judgment signed for want of a plea, while there was a plea in the office. On the discussion, it was admitted that the judgment was irregular, but it was contended on the part of the plaintiff, that this was not an irregularity for which he ought to be liable to the payment of costs. The plea was the sham plea of judgment recovered in the Mayor's Court. *Solomons* v. *Lyon*, 1 *East*, 372. Lord *Ellenborough* Ch. J. It certainly is a plea in point of law, and I do not know whether you can take advantage of the infirmity of the plea, in point of fact. If you had applied to the Court, perhaps they might have allowed you to sign judgment, but as it is the rule must be made absolute with costs.

Judgment signed after plea in office, set aside, though it was a sham plea of judgment in Mayor's Court.

So where the pleas are not manifestly absurd, as where they require several issues, &c. the Court would set them aside on motion; but the plaintiff will not be justified in signing judgment as for want of a plea, without an application to the Court. *Bill* v. *Alexander*. *Hil.* T. 1817, *Feb.* 12th. *Storks* shewed cause against a rule obtained by *Pollock*, to set aside a judgment which had been signed as for want of a plea. He contended that the plea was a sham plea. The action was framed in assumpsit, and the defendant had pleaded, 1st, a judgment recovered in the Exchequer, and 2dly, a plea of payment. He observed, that two trials would be necessary, and cited *Penfold* v. *Hawkins*, 2 *M.* & *S.* 606. and *Drayest* v. *Pilkington*; *Duberly* v. *Phillips*, *Mich.* T. 1816, K. B. *Pollock* relied upon *Blewett* v. *Marsden*, 10 *East*, 237, where he said the application was to the Court for leave to sign judgment as for want of a plea, which should have been done here Lord *Ellenborough* Ch. J. Unless the plea is, on the face of it, absurd and nonsensical, how can you take upo nyourself to say, it is a mere nullity? There may be such a judgment. You should not treat it as a nullity; you should have come to the Court to set the plea aside. Rule absolute.

Unless a sham plea is clearly absurd on the face of it, the plaintiff should not sign judgment as if it were a nullity, but must apply to the Court for leave to do so.

It is otherwise when the plea is clearly absurd on the face of it, in which case the plaintiff may sign judgment without a previous application to the

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liable. The affidavit upon which this motion was made, stated positively that this plea was false, but

The COURT said they could not try the falsehood or truth of the plea upon affidavit; and that this case was distinguishable from those in which it had been recently decided, that if a false plea state matter which requires two modes of trial, one by the record, and the other by the country, the plaintiff shall be permitted to sign judgment for want of a plea.

Rule refused.

Where plea is clearly absurd on the face of it, plaintiff may sign judgment without previous application to the Court.
If one plea be in bar only, though pleaded severally to different parts of the declaration, where part of it is bad it is bad for the whole.

Court. *Phillips* v. *Bruce*. *Hil.*T. 1817. *Feb.* 12. *Lawes* V. shewed cause against a rule obtained by *Scarlett* to set aside a judgment which had been signed as for want of plea, for irregularity. It was contended, that the plea was absurd on the face of it. It was a three-fold plea, and attempted to set up as a defence a judgment recovered in the Exchequer in *Ireland*, long before the bills upon which this action was brought were in existence. Lord *Ellenborough*, Ch. J. That is ridiculous; this is a foolish plea, intended only for delay; the object is obvious. It is mere nonsense, the judgment being before the bills were made. In the last case, *Bill* v. *Alexander* (*supra*), we held, the plaintiff should have applied to the Court, as there might be a doubt; here there is none. *Scarlett*, for the defendant, contended that if a part of the plea was good, it was good as to the rest; and that a plea could not be treated as a nullity because part of it was bad. *Bayley* J. It is one plea to the whole declaration; therefore if it is bad in part, it is bad as to the whole. *Scarlett*. The Court has said that the party ought to apply to the Court, and not to sign judgment of his own authority. Lord *Ellenborough* Ch. J. That is where there is any doubt on the plea, and not where it is clearly and distinctly on the face of it a sham plea, and absurd, as this is. If sham pleas are used, they must not be new and fantastic, and framed to deceive the parties who are to reply to them. If pleaders wish to be as mischievous as their ancestors, they must be as dull; we must have no novelties. *Bayley* J. said there were some old cases in which the Court said they would enquire who signed such pleas. (*Pierce* v. *Blake*, 2 *Salk*. 515.) *Abbott* J. This is clearly a sham plea on the face of it; and the rule must be discharged. Rule discharged accordingly. See *Bone* v. *Bunter*, *post*, *June* 30th, and notes to that case.

Tuesday, June 29th.

UNSTED *against* KIDD.

An arbitrator under a rule of reference, which directs that the costs of

COMYN on a former day obtained a rule calling on the defendant to shew cause why so much of the award made in this case as related to costs should

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the cause shall abide the event, has no power to direct those costs to be set off against the costs in a prior cause, although all matters in difference are referred. But the award is not to be set aside entirely, but only that part which is incorrect. (a)

not be set aside, and why the plaintiff should not be at liberty to take out execution conformably to the order of reference, which directed the costs to abide the event. This was an action for trespass; and the cause coming on for trial, it was agreed to refer all matters in difference between the parties to the award of an arbitrator. By the order of reference the costs of the cause were directed to abide the event of the award, and the costs of the reference were to be in the discretion of the arbitrator. The arbitrator awarded 10*l.* damages to the plaintiff, and directed that the damages laid in the declaration should be reduced to that sum; and then he ordered, that if the costs of the said action should amount to more than 46*l.* 12*s.* 10*d.* (the sum found to be due to the defendant in a cross action) then that sum should be set off against the plaintiff's damages and costs.

Chitty now shewed cause against the rule, and submitted that inasmuch as by the order of reference

(a) See *Tidd.* 330, 1027; *Hull.* Costs, 472, 3. from which it appears that in K. B. the attorney's lien is not to be defeated by a set-off of the costs of one cause against another, but that a different rule prevails in C. P. It has been held in the Court of Common Pleas, that where an action is referred to arbitration, and the arbitrator awards the costs of a nonsuit to be paid by the one party, and a larger sum to be paid as a debt by the other, the party awarded to pay the smaller sum is entitled to a set-off without motion; and if payment of the smaller sum is enforced by attachment, the Court of C. P. will set the attachment aside. Independently of the attorney's lien, it seems that it ought to make no difference with respect to the right of set-off, that the costs sought to be deducted are directed by the terms of the order to abide the event of the award; for it is a general rule that there may be a set-off both at law and in equity, notwithstanding an express agreement to pay in ready money. *Eland* v. *Karr*, 1 *East*, 375. 16 *East*, 138. 13 *Ves.* 180. In the case of the Highgate Archway Company v. *Nash*, *antè*, 325. where it was directed by the rule of reference that the costs should abide the event of the award, and the arbitrator awarded a certain sum to be paid for damages, without any mention of costs, and directed that execution should not be taken out for the damages but that they should be set off against a counter-demand of the defendant, it was nevertheless held that the plaintiff's attorney might take out execution for the costs.

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all matters in differenee between the parties were referred to the arbitrator, the latter had authority to determine what was reasonable and just between the parties. He contended that the award had been made upon this principle, and therefore might be supported in point of law. In the case of *Roberts* v. *Mackoul*, (*a*) *Wilmott* Ch. J. said, "That setting off one demand against another, which has not long been expressly allowed by our law, was allowed by the Roman law, and is agreeable to natural justice. An attorney has, as between himself and his client, a lien for his fees and his disbursements upon the damages and the costs recovered in an action; but he, equally with his client, is subject to the rules of natural justice, and consequently the costs taxed for the defendant in the former action may as well be deducted from the damages and costs taxed for the plaintiff in the present action, as if the plaintiff's attorney had no lien upon those damages and costs." It appears that in a Court of Equity, (*b*) the costs are arranged according to the equities of the parties, and the solicitor's lien is only upon the balance under that arrangement. The question is, whether the arbitrator in this case has not made an award agreeable to the dictates of natural justice. The arbitrator seems to have considered what ought to be done between the parties; and having a discretion vested in him, he exercised it according to his view of the justice of the case. He also urged that the arbitrator had by his award divided the costs of the reference and award, which he would not have done if he had considered himself precluded from directing the costs to be set off against the debt due to the defendant, in which case he would probably have made the plaintiff pay all the costs of the reference; and there-

(*a*) C. B. T. 9. G. 3. *Say.* Costs, 254. S. C. cited in *Thrustout* v. *Crafter*, 2 *Bla.* Rep. 827. *Hull.* Costs, 472.

(*b*) 15 *Ves.* J. 75, 79.

fore if the award should be at all affected, it should be set aside entirely. But

PER CURIAM. The arbitrator in this case appears to have no discretion given him as to the costs of the cause. His discretion is confined to the costs of the reference, and he has no right to give any directions as to the costs of the cause. The award may be good as to part, but bad as to the rest. Having no controul over the costs of the cause, it appears that the award is void as to that part which contains directions in that respect, and therefore this rule must be made absolute in the terms prayed.

Rule absolute.

Comyn was to have supported the rule.

STEWART *against* BRACEBRIDGE.

Tuesday, June 29th.

Where money is paid into Court by the sheriff under the 43 *G.* 3. *c.* 46. *s.* 2. neither the sheriff nor the officer of the Court is entitled to poundage on the money being taken out of Court.

THIS was a rule calling on the plaintiff's attorney to shew cause why the sum of 58*l.* deposited by the defendant in the hands of the sheriff under the 43 *Geo.* 3. *c.* 40. in lieu of bail, and since brought into Court by the sheriff, should not be paid out subject to the deduction of certain fees claimed by the sheriff. The question for the opinion of the Court was, whether the sheriff's or other officer's fees could be deducted from money paid into Court under the statute 43 *G.* 3. *c.* 46. *s.* 2. *Scarlett,* in the negative, was was stopped by the Court.

Gaselee and *Campbell,* in the affirmative, contended that the money paid into Court was subject to the deduction of the sheriff's fees, according to the construction of the rule of *Hil.* 5 *Jac.* 1. and the statute 43 *G.* 3. *c.* 46. *s.* 2.

ABBOTT C. J. I am of opinion that this case does

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not fall within the terms of the rule of 5 *Jac.* 1. by which it is ordered, "that every party *at whose request* any sum of money shall be brought into Court, here to be kept, do pay to the secondary of the chief clerk of our Lord the King here for the time being, for the keeping thereof, 20*s.* for every hundred pounds, and so according to that rate for every greater or less sum as well for a sum of money to be brought in form aforesaid as for a sum of money now remaining in Court; and for a sum of money under 10*l.* the sum of 2*s.* be paid as used to be paid formerly." This rule evidently applies to a case where the party at his own request pays the money into Court; the money in this case is not paid in at the request of a party to the suit, but by the sheriff; and unless we can find some words in the 43 *G.* 3. *c.* 46. *s.* 2. which allow of this deduction from the money paid into Court, I do not see how we can accede to this application. I can find nothing in the words of the statute which authorizes us in directing such a deduction to be made. The expressions of the 2nd section seem sufficiently to import that the whole money paid into Court may be paid out. The act directs that the sheriff shall in every such case, at or before the return of the said writ, pay into the Court in which such writ shall be returnable, the sum of money so deposited with him as aforesaid; and thereupon, in case the defendant or defendants shall afterwards duly put in and perfect bail in such action, according to the course and practice of such Court, the sum of money so deposited and paid into Court as aforesaid shall by order of the Court, upon motion to be made for that purpose, be paid over to the plaintiff or plaintiffs in such action, who shall be thereupon authorised to enter a common appearance or file common bail for such defendant or defendants, if the said plaintiff or plaintiffs shall so think fit." There is nothing here said that the money shall be paid out of Court upon payment of costs

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or of poundage to the sheriff, and consequently this case does not fall either within the terms of the rule referred to, or of the act of parliament.

BAYLEY J. I am of the same opinion. When the subject of sheriff's fees was before the Court last Term (*a*) the impression of the Court was that no fees were due to the sheriff unless they were given specially by the act of parliament; the rule of common law being that a sheriff has no right to take fees for the execution of process, however reasonable it may be that he should be entitled to some compensation or remuneration for his trouble. In the case contemplated by the rule of 5 *Jac*, 1. the object seems to be to give the officer of the Court a compensation for the risk and responsibility to which he is subject for taking care of the money brought into Court. The compensation there specified seems to be proper and reasonable in respect of the subject to which it relates. But with reference to this case, when we come to look attentively to the terms of the act of parliament under which this money has been paid into Court, the only construction we can consistently put upon them is, that all the money which is paid in is to be paid out; there is no provision there for any deduction. On the contrary, the direction is "that the money so deposited shall be paid out," in one case to the plaintiff, and in the other to the defendant. In this case the money is deposited by the sheriff; but we cannot say that the money so deposited is to be paid out to the plaintiff with deductions. I entirely agree with the opinion which my Lord has delivered on this case, and therefore I think this rule ought to be discharged.

HOLROYD J. The rule of *Hilary* Term, 5 *Jac*. 1. I am of opinion, does not apply to the present case, because it relates only to the payment of certain fees to the of-

(*a*) See *Drew v. Parsons*, *ante*, 295.

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ficer of the Court, upon money brought into Court at the request of a party to a suit; whereas this money is brought into Court by the express directions of the 43 *G.* 3. *c.* 46. *s.* 2. and not at the request of either of the parties. That statute directs that the money shall be brought into Court, and directs that it shall be paid out to the party who is entitled to receive it; but it says nothing with respect to the payment of fees to the sheriff, or other deductions. There is certainly a very onerous duty cast upon the sheriff, but at common law the sheriff is entitled to no compensation for his trouble. In no case can he take a fee for the discharge of his duty, unless it is given him by law. The statute here having omitted to give any compensation either to the sheriff, or the officer of the Court, it appears to me that neither the sheriff nor the officer of the Court can take any thing for the discharge of their duties respectively, and therefore I am of opinion that this rule must be discharged.

BEST J. When this case was first mentioned it occurred to me that it was like the case of money paid into Court, under a rule of Court, and was subject to the decision applicable to the payment of money into Court under such a rule. But after considering the case more attentively, I think there is a manifest distinction between the case where money is paid in under a rule of the Court for the convenience of the suitors of the Court, and where it is paid in under an act of parliament. It appears to me, that the rule of 5 *Jac.* 1. does not apply to this case. It is quite clear that the plaintiff could not be called upon under that rule to pay poundage to the sheriff, because under that rule the party desires to have the money paid into Court, and that is undoubtedly not the plaintiff. Within that rule, therefore, there is no pretence for saying that any poundage is to be deducted. But if in this case the money paid into Court by the sheriff

is to be paid out to the plaintiff, the legislature has said that in such case it shall be paid out without deductions, and the legislature has not said that the officer shall receive any remuneration for his trouble. I remember Lord *Ellenborough* once said, that if the legislature had created a duty for an officer to perform, but had not given any remuneration, this Court cannot give it, because the Court cannot do what the legislature has omitted to do. That principle seems precisely applicable to the present case. Here the legislature says that the money shall be paid into Court, by the proper officer, but it has omitted to say that the officer shall receive any reward; and it is not competent for this Court to supply the defect of the act of parliament. There is a case in *Salkeld* to the same effect. (*a*) There it is reported that one *Gifford* was libelled against in the Ecclesiastical Court for fees, and upon motion, a prohibition was granted: for it was held that no Court has a power to establish fees; the Judge of a Court may think them reasonable, but that is not binding. We should be establishing new fees if we were to accede to the proposition contended for, which we have no right to do. It is clear that the old rule of 5 *Jac.* 1. does not touch upon this question: if there is no other rule, authorising the payment of these fees, we have no power to create them; therefore, upon every established principle of law, we have no authority to accede to this motion. My opinion is founded, both with reference to the rule referred to, and to the act of parliament before us. It is said that this

(*a*) *Gifford's* case, 1 *Salk.* 333; and see *Ballard* v. *Genardid.* In that case the register in an Ecclesiastical Court libelled there for 4*s.* 6*d.* for his fees, and proceeded to excommunication. The defendant came and suggested that the office of register was a temporal office, and a freehold, and moved for a prohibition, which was granted; for the Court has no power to compel the party to pay fees to their officers, but they must bring their *quantum meruit;* or if the office be a freehold, they may bring an assize, for the denial of just fees is a disseizin.

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poundage is not to be paid by the plaintiff, but ought to be paid by the defendant, inasmuch as the money is paid in for his accommodation, and consequently that it ought to be at his expence. But I am of opinion, that he is not liable to any such payment, because the legislature has not directed any fee to be paid to the sheriff, and I do not think that the officer ought to be in a better situation than the sheriff; for though the sheriff may relieve himself by payment of the money into Court, yet the sheriff is much more likely to be exposed to loss, in consequence of the duties cast upon him, than the officer in consequence of his duties. It seems to me, therefore, impossible for us to direct the payment of the poundage in this case. It may be extremely proper that the sheriff, when new duties and new responsibilities are cast upon him, should receive that remuneration which justice requires, but is not for us to give him that remuneration.

Rule discharged without costs.

Tuesday, June 29th.

SERMON *against* BUCKNELL.

Where a cause stood for trial at the Second Sittings in Term, and the defendant obtained a rule for a special jury, but confessed that it was for delay, and the cause was ordered to be set down for the Third Sittings, and then the trial was farther delayed on terms which the defendant never performed, and *on this* account the cause could not be tried till after Term, and the *distringas* would not be returnable till next Term, Held, that the plaintiff could not have a rule for judgment as of the Term in which the cause ought to have been tried. (*a*)

A. *MOORE* moved for a rule to shew cause why the plaintiff should not be at liberty to enter up judgment as of this Term, admitting that his motion was novel in its nature. The facts upon which he moved were these:—The action was brought by the indorsee of a bill of exchange against the drawer, to recover a balance due thereon. Notice of trial had been given for the Second Sittings in this Term, but in the mean time the plaintiff was served on the 18th instant with a rule for the allowance of a special jury. A conversation afterwards took place between

(*a*) See *Maltby* v. *Moses*, *June* 22d. *ante* 489.

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the defendant and the plaintiff's attorney, in which the former admitted that he had moved for the special jury, not on account of any real ground of defence, but merely for delay. In consequence of this acknowledgment the plaintiff instructed counsel to move that the cause might be made a *remanet* to the Third Sittings in this Term, which was ordered accordingly; but after the cause had been set down for those Sittings, the defendant proposed an arrangement whereby he agreed to give the plaintiff a cognovit for the debt and taxed costs; and acting upon the faith of the performance of this agreement, the cause was not tried at the Third Sittings; but the defendant afterwards refused to perform his agreement, whereby the plaintiff lost a trial in this Term. In the ordinary course of practice, the *distringas* would not be returnable until *Michaelmas* Term, and consequently the plaintiff could not have judgment until that Term; but it was submitted, under the particular circumstances of the case, the Court would allow the plaintiff to enter up judgment as of this Term. *Sed per*

ABBOTT Ch. J. I think the court cannot accede to this motion. The rule was therefore refused.

DOE *against* RENDELL *and* ANOTHER.

Tuesday, June 29th.

Where an ejectment had been brought and judgment recovered in 1798, and the term of the demise laid in the declaration had since expired, the Court refused to grant a rule for enlarging the term and issuing a *scire facias*, the possession having changed, and the person who was the owner having since died. (a) Writ of possession cannot issue at the distance of 20 years after judgment, without a *scire facias*, to be obtained on motion.

SCARLETT on a former day moved for a *scire facias* to revive the judgment in an ejectment tried at the Spring Assizes, 1798, for the county of *Devon*, the plaintiff having recovered one sixth part of the premises in question, for which Judgment was entered

(a) In the case of *Peaceable* v. *Watson*, 4 *Taunton's* Repts. 16. where in an action of ejectment an objection was raised, that the term alleged to

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up in the course of the same year, but for which no writ of possession had been sued out. The object of

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have been demised to the plaintiff had expired before the trial, the learned Judge at *Nisi Prius* overruled the objection, and the Judge's opinion was afterwards confirmed by the Court, who said that it might be cured by amending. In *Oates* v. *Shepherd*, 2 *Stra.* 1272. where the term in an action of ejectment was nearly expiring, it was amended without any consent from 5 years to 10 years. In *Roe* v. *Ellis*, 2 *Bla.* Rep. 940. where the declaration counted (by mistake) of a term which appeared to have expired 12 years before the action brought, it was held, that the declaration might be amended; and the Court said it might be amended by the writ which spoke of a term not yet expired. And in *Vicars* v. *Haydon*, *Cowp.* 841. where these last two cases were considered, the Court of K. B. after judgment had been affirmed in an action of ejectment from *Ireland*, amended the declaration by enlarging the term, although the record was remitted to the Court below in *Ireland*.

Amendment allowed in declaration of ejectment, where the day of the demise was laid before the title accrued.

So the day of the demise in a declaration in ejectment may be amended, as where the day is laid before the lessor's title appears to have accrued. *Doe* ex dem. *Rumford* and another v. *Miller* and *Levett*, *Hil.* 54 *Geo.* 3. Action of ejectment for recovery of the possession of premises at *Bethnal Green*. The lessors of the plaintiff were landlords of 11 houses let to the defendants, who by their lease covenanted to finish them by *Michaelmas*, 1813. The lease was to hold from the 25th of *March*, in the same year. The demise was laid on the 25th of *March*, to hold from the 26th. The houses were not finished at *Michaelmas*, and the ejectment was brought for a forfeiture incurred by the breach of covenant. *Park* obtained a rule *nisi* to amend by laying the demise on a day after the forfeiture was incurred. *Reader* shewed cause; but the *Court* allowed the amendment on payment of costs, and the plaintiff tried the cause and recovered at the Sittings after Term:—S. C. *Adams* on Eject. 2nd ed. 199, n. 5.

Amendment allowed in the day of the demise in a declaration in ejectment on a forfeiture for dilapidations.

See also as to this point, *Anonymous*, *Mich.* T. 1813, *Nov.* 24th. *Gaselee* on a former day had obtained a rule to shew cause why the day of the demise in a declaration in ejectment should not be altered from the 3rd of *April* to the 14th of *May*, a day subsequent to the expiration of a notice to repair, which had been given in order to found the action. The action was brought on the ground of a forfeiture incurred by dilapidations. *Comyn* now shewed cause, and urged that the Court of Common Pleas would not amend in real actions, (see 2 *Saund.* Rep. 459. 1 New Rep. 64, 233. 3 *Bos.* and *Pul.* 453. 2 New Rep. 429. 6 *Taunt.* 193, 5, 6.) and that this being the case of a forfeiture, the Court could not allow an amendment. *Le Blanc* J. That seems your strongest ground. *Sed per* Lord *Ellenborough* Ch. J. *et Cur.* I see no reason why we should draw a distinction as to amendments to be made in cases of forfeiture from other cases. There was a distinction, in former times, as to amendments in penal actions, but it is not now attended to. *Mestaer* v. *Hertz*, 3 *M.* and *S.* 450. 2 *Burr.* 1099. 6 T. R. 173. We think, therefore, that there is no objection to this amendment, and that the rule must be made absolute.

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the application was to enable the lessor of the plaintiff to obtain possession of that part of the premises which had been so recovered. The motion being then discussed, it appeared upon affidavit, that the term laid in the declaration was only for seven years, and had now expired, and consequently that the writ of *habere facias,* which must be issued upon this motion, would be irregular, and inconsistent with the previous proceedings. It appeared also, another tenant was now in possession of the premises. The Court therefore suggested, on the authority of *Vicars* v. *Haydon,* (a) that the plaintiff, before he could move for the *scire facias,* should take a rule to shew cause why the declaration should not be amended, by enlarging the term; and accordingly a rule *nisi* was drawn up for that purpose.

Casberd now shewed cause against both rules, the one for enlarging the term, and the other for the *scire facias* to revive the judgment; and as to the latter, he submitted a preliminary objection, contending on principle, and the authority of decided cases, that the rule

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So a declaration in ejectment has been allowed to be amended in the description of the premises, as by leaving out the word tenements, after judgment and a writ of error brought. *Anonymous, Trin.* T. 1814, *June* 27. *Barrow* on a former day had moved for a rule calling on the defendant to shew cause why the declaration in ejectment should not be amended, (although after judgment given, and a writ of error brought in the House of Lords) by striking out the words "five tenements." The Court granted a rule *nisi* on payment of costs. The Attorney-General and *Marryat* now shewed cause, and urged that the application came too late after verdict and judgment, where there was nothing to amend by. *Dampier* J. The term in the demise has been altered after verdict, and there is a case to that effect (*Vicars* v. *Haydon, Cowp.* 841; and see *Oates* v. *Shepherd,* 2 *Stra.* 1272.) and in that case there could have been nothing to amend by. *Bayley* J. There are many cases to that extent. The *Court* therefore made the rule absolute upon payment of costs, but said that the writ of error must not be quashed, for there might be other error, and if not, the defendant would proceed therein at his peril. See other cases, *Adams* on Ejectment, 2nd ed. 25.

Declaration in ejectment amended in the description of the premises, after judgment and a writ of error brought, by leaving out the word tenements.

(a) *Cowp.* 841.

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could not be made absolute, inasmuch as the tenant now in possession of the premises was not a party before the Court. There were originally two defendants in the action of ejectment; one, *Elias Tuckett*, the proprietor of the premises, and the other, *James Rendell*, his tenant, whose interest in the property had now ceased, by the expiration of his lease. Since that time another tenant had become possessed of the property, and was now in possession, but was not served with this rule, which he contended he ought to have been. Though he now appeared for *James Rendell*, in pursuance of the rule served upon him, as the surviving defendant, (*Elias Tuckett* having since died) still it was necessary that the tenant in possession should be served with the rule, because, for any thing that appeared, *James Rendell* had now no interest in the property.

Scarlett said, that he had an affidavit, shewing that *Rendell* was now interested in the premises, and was competent to shew cause against this rule, being the only surviving defendant on the record. Whereupon the Court intimated, that they would, in all events, call upon the other side to shew cause against the rule for amending the declaration.

Casberd then shewed cause, and contended that no case could be found in the books to warrant the Court in amending a declaration in ejectment, served more than twenty years ago. The circumstances under which this application was made were these:—In *Trinity* Term 1798, the lessor of the plaintiff declared in ejectment for the whole of the premises in question, and at the Spring Assizes at *Exeter* 1799, he recovered a verdict for only one sixth of the whole. Judgment was entered up in that year, but no writ of possession was sued out. In the year 1801, the same lessor of the

plaintiff brought another ejectment against the same defendants, to recover the remaining five sixths of the same premises; but in that ejectment the plaintiff was nonsuited. Another ejectment was afterwards brought in 1808 by the same lessors of the plaintiff, against *P. P. Tuckett,* who succeeded to the inheritance of the estate after the death of his father *Elias,* and *James Rendell,* the then tenant in possession, to recover the whole of the estate; and on that occasion a verdict was found in favour of the defendants. Under these circumstances he submitted, that the application now made to revive the judgment upon the first ejectment for one sixth of the premises, could not be sustained upon any principle of law, inasmuch as there had been an express adjudication in favour of the defendants upon the third ejectment. Since that third ejectment, another change had taken place in the ownership of the property. The original defendant in the first action, *Elias Tuckett,* took possession of the estate under the will of his father, who settled the property in tail. On the death of *Elias, Philip P. Tuckett* took possession as second remainder man. He had since died, and a third party had now come in as tenant in tail, under the same will of the father of *Elias Tuckett,* and that person had now the legal property of the estate vested in him. The estate therefore having changed its owners, the Court were thus called upon to revive the original judgment after the expiration of twenty years, no writ of possession having ever been sued out. With respect to the tenancy in possession, there had also been three several changes. At the time of the first ejectment *James Rendell* was in possession; at the time of the third *John Rendell* was in possession; and now *William Rendell* was in possession, and the last mentioned person was made no party to the rule for a *scire facias.* Under these circumstances there were three questions for the consideration of the

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Court: 1st, whether the adjudication in favour of the defendants on the third ejectment was not a bar to the revival of the judgment on the first; 2nd, whether the first declaration having been served more than twenty years, the plaintiffs were not barred by the statute of limitations; and 3rd, whether the Court would permit the amendment of the declaration, by enlarging the term which had expired, all the parties interested not being properly before the Court. He submitted that there was no authority in law to support any one of these questions in favour of the plaintiff. With respect to the alteration of the record, there were several authorities to shew that the Court would in no instance enlarge a term which had expired, without the consent of the parties who would be affected by the alteration. This case was clearly distinguishable from *Doe* v. *Pilkington*, (a) *Vicars* v. *Haydon*, (b) and *Roe* v. *Ellis*.(c) The case of *Withers* v. *Harris*, (d) was an authority, to shew that in ejectment execution cannot be sued out after a year and a day, without *scire facias;* but in the present case twenty years had elapsed since judgment was entered up, and the party who would be affected by this motion was not now before the Court. If the Court were to grant this application, it would be giving the plaintiff an advantage which he could not obtain if he had brought a fresh ejectment; because in that case he would be barred by the statute. The object, therefore, of the plaintiff was *per saltum* to take possession of this property by virtue of a writ of execution, in a case where the statute would deny all remedy; because if he were to attempt to recover by another ejectment, he could not have succeeded. The Court therefore could not accede to either of these applications; first, as to the amendment, because the proper parties were not before the Court; and secondly,

(a) 4 *Burr.* 2447. (b) *Cowp.* 841. (c) 2 Sir *W. Bl.* 940.
(d) 1 *Salk.* 258.

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as to the *scire facias*, the declaration having been served more than twenty years since, and the plaintiff having failed in two other actions of ejectment to recover the same property.

Scarlett and *Bingham*, contrà. The only remedy which the plaintiff has in this case, under the circumstances stated, is to sue out a *scire facias* to revive the judgment, in order that he may have execution for the one sixth of the premises recovered in 1799. This is the proper course to be adopted, as appears by the case of *Withers* v. *Harris*. (*a*) But in order to give the plaintiff the advantage of this remedy, it is necessary for him to enlarge the term, so that no formal objection shall stand in the way of discussing the question. The enlargement of the term is the usual and proper mode of proceeding, with a view to raise the question, in order that the plaintiff may not be driven to his writ of right. There are several authorities to shew that the Court will enlarge the term for this purpose. *Doe* v. *Pilkington*, (*b*) *Roe* v. *Ellis*, (*c*) and *Vicars* v. *Haydon*. (*d*) As to the objection that the proper parties are not before the Court, in consequence of changes having taken place in the ownership and possession of the property, it is no answer to the present application; because if such changes have taken place, they may in their proper season operate to prevent the plaintiff from having execution. This is only an application to the Court for a *scire facias* to revive the judgment; and if upon the *scire facias* being brought, it appears that the defendants have a title, acquired since the first ejectment, it may be pleaded in answer to this proceeding, and the defendant will have the full benefit of it. Therefore the circumstance of changes having taken place in the property is no objection to the present

(*a*) 1 *Salk.* 258.
(*b*) 4 *Bur.* 2447.
(*c*) 2 Sir *W. Bla.* 940.
(*d*) *Cowp.* 841.

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motion, because at a future time it may be shewn, in pleading and in evidence, as good cause why the judgment should not be revived. But the persons now in possession must then shew a distinct title acquired since. In the mean time, however, the objection arising from the lapse of time will not be taken away by making this rule absolute. The proceeding by *scire facias* is certainly not new. *Proctor* v. *Johnson.* (*a*) And this is the only way in which the plaintiff can proceed to obtain execution upon the verdict he has recovered; and the Court will observe, that no objection is suggested to his title. It cannot be urged that the subsequent ejectments brought are to operate as a waiver of the judgment upon the first, because this could not be done except by a release under seal. Where a party has neglected to sue out execution upon a judgment recovered, lapse of time is no objection against him. Undoubtedly in this case an amendment must be made in the declaration, by enlarging the term, so as to entitle the plaintiff to sue out execution. The term is merely a fiction, in order to try the question; and the Court for that purpose will accede to this motion. (*b*)

Abbott Ch. J. I am of opinion, that even if this declaration had been sufficiently large to answer the purpose, we ought not, under the circumstances of this case, to allow a writ of *scire facias* to issue. The application for an amendment of the declaration, by enlarging the term, is purely to the discretion of the Court. No doubt the Court will refuse the application, where they see great mischief likely to arise from granting it. I go further; I think we ought not to grant it, unless it is shewn that mischief will not arise. In such a case as this, I must have the negative proved: here the negative is not proved. The cir-

(*a*) 1 Lord *Ray*, 669. (*b*) 2 *Str.* 1272, *Oates* v. *Shepherd*.

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cumstance of the plaintiff's having obtained judgment for one sixth of the premises, would not have concluded the defendant, even if he had taken out execution; because the defendant might have brought another ejectment against the plaintiff, and he might have tried the question over again; and for aught I know, he might have good ground to support his case. Are we therefore now to place him in a worse situation than he would have been in then? Had he been obliged to bring an ejectment to recover back the premises, he might then have called witnesses to support his title, many of whom may now be dead, and others not to be found. It is admitted, that the owner of the estate against whom this ejectment was brought, is now dead, and that the then occupier is not in possession. The freehold of the property has passed in a course of descent, according to the limitations of the settlement, from the grandfather to his grandsons, and the grandsons may have no means of knowing any thing of the title, which the grandfather might be expected to know. I therefore think we ought not to grant this application; for by granting it, we should be giving encouragement to procrastination and delay, which ought not to be encouraged. I am of opinion that both rules must be discharged.

BAYLEY J. The authorities which have been cited say, that a party shall not be precluded by the expiration of the term from bringing a *scire facias* upon a judgment, but may apply to the Court to enlarge the term; but they do not mean to say, that because the party is at liberty to make such an application, the Court will therefore permit the amendment in a case where no amendment ought to be made. To grant a *scire facias* in this case, would be an act of injustice to the defendant, because the death of witnesses may have since occurred, who might have been able to give

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a complete answer to the writ. I therefore agree with my Lord, that these rules must be discharged.

Holroyd J. I am of the same opinion. The effect of the motion is this:—the plaintiff cannot bring a fresh ejectment, in consequence of the expiration of twenty years; he therefore wishes to amend the declation by enlarging the term, in order to support his *scire facias*. I think the defendant has a right to hold him strictly to the pleadings as they were first stated on the record; and I am of opinion that the present motion ought not to be granted, for if it were, the plaintiff, who has been guilty of laches in not suing out execution, would be placed in a better situation than he would have been in when he first obtained judgment.

Best J. concurred.

Rule discharged.

Tuesday, June 29th.

Morris *against* Hunt.

Where an attorney charged for a declaration as containing more folios than it really contained, and this charge was allowed by the master, Held, that this was a ground for reviewing the taxation. Held, that the master was justified in allowing the expences of two writs issued in one action against the defendant into different counties where it was doubtful in which county the defendant was to be found. (*a*) Held also, that the master might allow the sum of one guinea each to talesmen on the trial of a cause by a special jury in *London* or *Middlesex*. Held also, that the plaintiff might be allowed for fees to three counsel on taxation of costs in a cause of difficulty.

On a former day the defendant obtained a rule calling on the plaintiff to shew cause why the master should not review his taxation of costs in this cause. It was an action at the suit of the high bailiff of *Westminster*, to recover from the defendant a third share of the expence of erecting hustings, paying poll-clerks, &c. at the last general election for the city of *West-*

(*a*) As to the practice of issuing two writs into different counties for the same cause of action, see *Powell* v. *Henderson*, *ante*, 392; *Bullock* v. *Morris*, 2 *Taunt*. 67.

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minister, for which the defendant was one of three candidates. A verdict having been found for the plaintiff, the costs were referred to the master, who on the taxation allowed the expense of two writs, the one a *latitat* issued into *Hampshire*, which was not served, and the other a bill of *Middlesex*, which was served, both being for the same cause of action;—forty folios for the declaration, the real number on minute examination being in fact no more than thirty five;—three counsel, four having been employed;—twelve guineas for twelve special jurymen, four only of the special jurors originally returned having in fact served upon the jury, and the remainder being talesmen;—and for two notices of declaration, one served in *Hampshire* and the other in *London*; all of which items were objected to on the part of the defendant.

Scarlett now shewed cause on an affidavit stating in substance that it had become necessary to sue out two writs (namely the *latitat* into *Hampshire* as well as the bill of *Middlesex*), in consequence of the defendant's being in the habit of changing his residence, being sometimes to be found in *Hampshire*, and at other times in *Middlesex*;—that the two notices of declaration had become necessary from the same cause;—that the allowance of forty folios for the declaration had been made on the usual mode of calculation before the master, to which the defendant had on that occasion made no objection;—that the allowance of a guinea to each of the eight talesman who sat on the jury was conformable to the universal practice in the master's office, in the taxation of costs of causes tried in *London* and *Middlesex*; and that the allowance for the fees of counsel was agreeable to the practice of the same office, in cases of the like description. As to the item of allowance with respect to the number of folios in the declaration, it was contended that the objection was

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not now available, because the defendant being himself present at the taxation of costs, he had an opportunity of resisting the allowance, if it was improper, but having neglected so to do, he ought to be tied down to the same strictness which the Court would observe with respect to an attorney under the like circumstances. As to the other items objected to, it was submitted that they were justifiable, upon the universal practice adopted in the master's office under similar circumstances.

The defendant in person, in support of the rule, contended, first, that the overcharge allowed by the master, with respect to the number of folios in the declaration, was clearly a ground for reviewing the taxation; secondly, that there could be no occasion for the issuing the double process referred to; and thirdly, that it was contrary to law to allow to talesmen the same fees payable by statute to special jurors, and equally contrary to law to require a defendant to pay the fees paid to the plaintiff's counsel, such fees not being recoverable by the counsel in a court of justice.

BAYLEY J. (*a*) This application is made to the Court to review the master's taxation, on several different grounds. The *first* is, that the expence of two writs has been improperly allowed by the master. Whether those writs were both running at one and the same time is not suggested in the affidavit on which the application is founded; but the foundation of the application is, that it was unnecessary to issue the two writs, because the defendant's residence, in *London* must have been known to the plaintiff's attorney, and consequently that he might have been served at that residence, if ordinary pains had been taken for the purpose. The answer to

(*a*) The Chief Justice had left the Court.

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this objection, is, that the plaintiff's attorney originally made enquiry at the defendant's lodgings in town, but found that he was then residing in *Hampshire*. That circumstance made it necessary to issue a writ in the latter county, which it was the duty of the plaintiff's attorney to do. Before the writ could be served, the defendant came up to *London*, and consequently the object of suing out that writ was defeated. It therefore became necessary, in order to reach the defendant, to sue out a Bill of *Middlesex*. Inasmuch as it does not appear that these were concurrent writs, and as the plaintiff's attorney had an adequate motive for suing out the two, I am of opinion, that the master was justified in allowing in his taxation the expence of both. The *second* objection is, that the notice of declaration was given in the country instead of being served in town. I do not think that that furnishes a sufficient ground for this application to the Court, because although the defendant happened to be in town at the time, it did not necessarily follow that he would have continued in town, and the difference between serving the declaration in town or in the country, is extremely immaterial. It is impossible therefore to impute to the master any improper motive for the allowance of this item. The *third* objection is, that the master has allowed forty folios for the declaration, there being in fact only thirty-five. It appears that the defendant was originally charged, and was obliged to pay for forty-five folios, in taking a copy of the declaration out of the office, and that the master has allowed for forty folios. When it is considered what is the duty of an attorney in this respect, I think there is no difficulty in the course to be pursued by the Court with respect to this objection. The attorney is to make his charge in proportion to the length of the proceedings; and it is his duty, before he makes the charge, to know what the length is. He has no right to proceed upon

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conjecture, because he has the means in his own hands of coming at the certain knowledge of the charge to be made. I know that it was heretofore the practice to ascertain by counting the folios the exact length of the proceedings. It was formerly the practice, before a declaration was served, to ascertain the exact amount of the sum to be paid by the defendant, before he took the declaration out of the office; and certainly it is extremely proper that this should be done, in order to regulate the subsequent charges. If the plaintiff's attorney, instead of counting the folios, chuses to proceed on conjecture, he does so at his peril, and if it turns out ultimately that he was wrong, the blame of being wrong is imputable to himself, and whatever expences have been incurred by the defendant in setting the matter right, ought properly to fall on the attorney. Now in this instance, on the application being made to the Court for the master to review his his taxation, upon the ground that forty folios were allowed when thirty-five was the utmost extent of allowance that ought to be made; if the attorney had immediately communicated with the defendant and said, "I find I have charged five folios too much, and therefore I return you eleven shillings which have been overpaid," he would have set himself right; but inasmuch as he was wrong in the first instance in that respect, and inasmuch as when by this rule the objection is pointed out to him he does not do that which is necessary to set himself right, I think the consequence must be, that the master should have the opportunity of looking at that item again, to see whether in that respect the plaintiff's attornies are not wrong, and that is to be at their expence; and on that account the defendant will be entitled to the costs of this application. (*a*) The *fourth* ground of objection to the

(*a*) Vide *Lee* v. *Lingard*, 1 *East*, 401, 404; *Grojan* v. *Lee*, 5 *Taunt.* 652.

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master's taxation is, that the persons who served as talesmen on the jury were allowed a guinea each, whereas by law, (as it is suggested) they were entitled to no more than an allowance of eight-pence or fourteen-pence each, as the case might be. I believe in point of practice, for a considerable length of time, the invariable rule in *London* and *Middlesex* has been to treat the talesmen on the same footing with the special jurymen, when they are resorted to for the purpose of making up a special jury, when the whole pannel of special jurors do not attend. I know that in many instances, particularly in the country, a difference is made between the special jurymen and the talesmen, and that that difference is continually the ground of complaint on the part of the talesmen. In some instances I have heard them complain that the special jurymen have received their guinea, whereas they have received only half a guinea, thinking it extremely hard that they should not both be put upon the same footing. A Judge at *nisi prius* in the country never, I believe, interferes with what is the settled practice in that respect. In *London* and *Middlesex* it seems to be the settled practice to make no distinction between the special jurymen and the talesmen. This practice seems to be general, and it appears to me that talesmen come within the description in the statute 24 *Geo.* 2. *c.* 18, *s.* 2. just as much as the original special jurymen; it being there said that no person who shall serve upon any jury appointed or returned by any of the acts therein mentioned shall be allowed to take for serving on any such jury more than the sum of money which the Judge who tries the issue shall think just and reasonable, not exceeding the sum of one pound and one shilling. In that respect the constant and invariable course has been, to leave it to the discretion of the master to say what allowance shall be made. It appears to me, that when the master confines him-

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self within the sum of one pound one, and there is no direction by the Judge who tries the cause to make a different allowance, the decision of the master is to be decisive upon the subject. The *fifth* objection is with respect to the fees paid to the counsel in the cause, and that objection has taken two different shapes; one that too many counsel have been employed, and the other, that the defendant is in no respect liable to be charged with the fees of any counsel. With respect to the number of counsel, it appears that the master has allowed three, and it seems to me that the master ought in these cases to exercise a discretion, which discretion must be regulated to a certain degree by the nature and magnitude of the cause, and the number of witnesses which are likely to be examined. It is fit that in cases of difficulty, in which points of law may arise, that the leading counsel should have the assistance of other gentlemen to suggest what may be necessary in the course of discussion. In cases of that description the allowance of counsel should not be regulated in the same manner as in a common action for goods sold and delivered, or in an ordinary case in which no difficulty is likely to arise. Considering the nature of this case, I can by no means say that the allowance for three counsel on the taxation of costs was too much. I think it was a reasonable allowance, and that the plaintiff was entitled to have the decision of the master in his favour to that extent. But then the suggestion is, that by law no man is liable to pay for counsel at all, and that therefore the whole of this charge for counsel is improper. That seems to me to arise entirely from a mistake in point of law. It is never expected, it never has been the practice, and in many instances it would be wrong, that counsel should be gratuitously giving up their time and talents without receiving any recompence or reward. It is the recompence and reward which induce men of consider-

able ability, and certainly of great integrity, and with every qualification which is necessary to adorn the bar, to exert their talents. It is the emolument in the first instance, to a certain degree, that induces them to bear the difficulties of their profession, and to wear away their health, which a long attendance at the bar naturally produces; and it is of advantage to the public that they should receive those emoluments which produce integrity and independence; and I know of nothing more likely to destroy that independence and integrity than to deprive them of the honorable reward of their labours. But it is said that counsel can maintain no action for their fees: why? because it is understood that their emoluments are not to depend upon the event of the cause, but that their compensation is to be equally the same whether the event be successful or unsuccessful. They are to be paid beforehand, because they are not to be left to the chance whether they shall ultimately get their fees or not; and it is for the purpose of promoting the honor and integrity of the bar, that it is expected all their fees should be paid at the time when their briefs are delivered. That is the reason why they are not permitted to maintain an action. It is their duty to take care, if they have fees, that they have them beforehand, and therefore the law will not allow them any remedy, if they disregard their duty in that respect. The same rule applies to the case of a physician, who cannot maintain any action for his fees. He therefore is to receive his fees at the period of time when his attendance occurs. These are the reasons why the gentlemen of these two professions can maintain no action for their fees; but is it to be supposed that men are to waste their lives to qualify themselves for their profession, without receiving any emolument? That never can be imagined; and the constant course which has been adopted, shews that it never could be so understood.

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If this is not the right rule, the Courts of *Westminster Hall* have been in error for centuries, because they have been in the constant habit of allowing to plaintiffs when they succeed, the fees of counsel on the one hand, and to the defendant the fees of their counsel when they succeed, on the other hand. This is the invariable rule acted upon on the taxation of costs. These are the different objections, which have been taken on the part of the defendant to the master's taxation, and it seems to me, that I have given the proper answer to each. I am of opinion that the master's taxation was perfectly right, except with respect to the charge on the length of the declaration. That charge was originally improper, and I think that the plaintiff did not act with sufficient discretion in not giving it up. I do not say that it was insisted on, but it was not abandoned. It appears to me therefore, that with respect to that *item*, and that only, the master ought to review his taxation, and if the declaration shall turn out to be short of forty folios, then the defendant will be entitled to the costs of this application.

HOLROYD J. It appears to me that none of the objections which have been taken in support of this motion are well founded, except the one which relates to the overcharge of the declaration. The reasons shewing that none of the objections can be supported, except that, have been so fully entered into and so ably stated by my brother *Bayley*, that I think it not requisite to say any thing further with respect to them, than to express my entire concurrence. With respect to the overcharge of the declaration, whatever may be the present usage in the master's office with a view to save trouble, it is incumbent on the person who makes the charge to ascertain the quantity of pleading before the charge is made, more especially, as any error in that particular is multiplied by the subse-

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quent copies of those pleadings, and the different records that are made of them. The plaintiff's attorney not having done that, it appears to me that he was in fault, in not having abandoned the overcharge after it was discovered. I am of opinion that this rule must be made absolute, he paying the costs which have been incurred on that ground. My mind has certainly fluctuated on that point; for if, when he was served with a rule, the attorney had expressed an intention of giving up that item, and of resisting the rule on the other grounds only, I should have thought that no costs ought to have followed. At present, however, I think that the defendant being brought here under the circumstances stated, he is entitled to the costs of this application.

BEST J. I agree with my brothers in the opinion they have expressed upon this subject. There have been five objections raised to the master's taxation. First, as to the writs; secondly, as to the service of notice of declaration; thirdly, as to the fees allowed to counsel; fourthly, as to the allowance of a guinea each to eight talesmen; and fifthly, as to the length of the declaration. [The language of the affidavit of the defendant, as it related to the supposed vexation in issuing two writs, was observed upon, and the learned Judge then proceeded.]— As to the objection that the declaration was not served in the county of *Hants*, but in the county of *Middlesex* only, if there was any thing in it he might have made an application to the Court to set aside the proceedings for irregularity. As to the other points, I agree with the rest of the Court, that the objection made as to the length of the declaration ought to go before the master, and that the persons who made the mistake ought to pay the costs. With respect to the money

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paid to the talesmen, I am rather surprised to hear any objection made on that ground. I am quite clear that we are authorized under the 24 *Geo.* 2. *c.* 18. *s.* 2. in allowing the talesmen a guinea each, when called upon to serve with special jurymen; and when we recollect the trouble and inconvenience to which common jurors are put in attending to their public duty in *London* and *Middlesex*, no man can reasonably object to their receiving a guinea each when called upon to serve as special jurors. As to the objection to the allowance of fees paid to counsel, it is said that counsel are to lend their assistance gratuitously for the suitor's benefit. Their assistance is rendered necessary to the plaintiff, in consequence of the defendant having neglected to observe his engagements. But it has been said, that inasmuch as counsel could not recover their fees from the plaintiff, therefore the plaintiff could not recover them from the defendant. The defendant mistakes the principle upon which he is called upon to pay these fees. His liability is founded upon the principle stated by my brother *Bayley*. Nothing can be more reasonable, than that counsel should be rendered independent of the event of the cause, in order that no temptation may induce them to endeavour to get a verdict, which in their consciences they think they are not entitled to have. Counsel should be rendered as independent as the Judge or the jury who try the cause, when called upon to do their duty. Was it ever understood by any man, that gentlemen who are put to the most enormous expence in rendering themselves competent to appear in a Court of Justice as advocates, are to act for nothing? No man is so ignorant or so stupid as to suppose that this can be the case. If this were the principle upon which we were to act, no man of integrity or honour would appear at the Bar; or, at least, no man duly qualified for the

discharge of his duty would venture to appear: and I will venture to say, that it will be one of the greatest misfortunes that can happen to this country, if such a notion is to prevail. There is nothing which has so great a tendency to secure the due administration of justice, as having the Courts of the country frequented by gentlemen so eminently qualified by their education and principles of honour, as at this time appear to discharge the duties which they are called upon to fulfil. If, under such circumstances, there could possibly be a disposition to do injustice to such men, the greatest injury would be done to the public. No man would attempt to qualify himself for the profession, and the greatest disorder and inconvenience would exist in the Courts, if we were to act upon the absurd principle contended for. It never entered into any man's contemplation, as a sound principle, that counsel are not to be paid their fees in the first instance, but that payment must depend upon the event. The argument now used in favour of the defendant, that a counsel cannot recover his fees at law, is answered by the usage which has for a great length of time prevailed, of allowing the fees of counsel on the taxation of costs. I believe it will be difficult to find the time when this practice commenced; but from the earliest time of which we have any trace, it has always been the practice in the different Courts of *Westminster Hall* to allow such fees on the taxation of costs. I therefore think this may be taken to be the law of the land. It stands upon as ancient an usage, and as sound a principle, as any other doctrine of the law of *England*; and certainly it never can be reasonably disputed by any man capable of thinking. I felt it my duty to make these observations, because it appears to me, that if the defendant could succeed in the objection he has taken, it would be doing the greatest mischief to the administration of justice that ever was done. It

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is not necessary for me to make any further observations, but I felt myself bound, as a Judge of this Court, to enter my protest against these doctrines.

Rule absolute with costs.

Tuesday, June 29th.

Exparte STOKES.

Where an attorney's clerk has served part of his time with one attorney, and part with another to whom the articles were assigned, the name of the assignee must be inserted in the notice of intention to apply for admission. (*a*)

TINDAL moved to admit this gentleman as an attorney of the Court, on an affidavit stating that he had regularly served his clerkship about three years

(*a*) By stat. 22 *Geo.* 2. *c.* 46. *s.* 9. it is provided, that if any attorney or solicitor to or with whom any such person shall be so bound, shall happen to *die* before the expiration of such term, or shall discontinue or *leave off* such his practice as aforesaid, or if such contract shall by mutual consent of the parties be *cancelled*, or in case such clerk shall be legally *discharged by any rule* or order of the Court wherein such attorney or solicitor shall practice, before the expiration of such term, and such clerk shall in any of the said cases be bound by another contract or other contracts in writing, to serve, and shall accordingly serve, in manner therein before mentioned, as clerk to any other such practising attorney or attorneys, solicitor or solicitors as aforesaid respectively, during the residue of the said term of 5 years, then such service shall be deemed and taken to be as good, effectual, and available, as if such clerk had continued to serve as a clerk for the said term to the same person to whom he was originally bound, so as an affidavit be duly made and filed of the execution of such second or other contract or contracts within the time, and in like manner as is therein before directed concerning such original contract. By rule of Court *Trin.* 31 *Geo.* 3. it is ordered that no person who shall enter into articles with an attorney or attorneys, shall be at liberty to serve the agent or agents of such attorneys for a longer time than one year of his clerkship, and that any such service to an agent or agents beyond that time shall not be deemed good service; and it is further ordered, that every person who shall intend to apply for admission as an attorney in this Court, and who shall not have been admitted an attorney or solicitor of any other Court, shall, for the space of one full Term previous to the Term in which such person shall apply to be admitted, cause his name and place of abode, *and also the name or names, and place or places of abode of the attorney to whom he shall have been articled, written in legible characters, to be affixed on the outside of the Court of King's Bench*, in such place as public notices are usually affixed in the King's Bench Office. 4 T. R. 379. He shall also, for the space of one full Term previous to the Term in which he shall apply to be admitted, enter or cause to be entered, in a book kept for that purpose at each of the Judges' chambers,

since, part of his time being served with one attorney, and the remainder with another, to whom the articles

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his name and place of abode, and also the name and place of abode of the attorney or attorneys to whom he shall have been articled. 5 T. R. 368. The notice must be put up for the Term immediately preceding the Term in which the application for admission is made. 2 *Marsh*. 48. As doubts sometimes arise respecting the rule by which the Court is governed in the exercise of a summary jurisdiction over its officers, the following cases are subjoined for the guidance of the practitioner:—

An attorney may be readmitted on the last day of the Term, when notice has been up all the Term.

Exparte Mr. ——, gentleman, one, &c. *Saturday*, 28th *Nov.* 1818. *Manning* moved on the last day of the Term, that a gentleman might be readmitted an attorney of this Court. Notice of the applicant's intention to apply for readmission had been affixed in the month of *October* on the outside of the Court of King's Bench and at the other usual places. *Bayley* J. (in comformity with the suggestion of the officer of Court) held, that an attorney might be readmitted on the last day of the Term, notice having been stuck up all this Term. Motion granted. See *Tidd*, 6th ed. 67. 2 *Marsh*. 123. The Court will not interfere summarily against an attorney, except for misconduct in his capacity of attorney; and then only in a case of delinquency, and not where the charge is in effect merely the ground of a civil action, or where it is not connected with the office of attorney. *Farmer* v. *Turner*, *Mich*. T. 1815. *Nov.* 7th. MSS; *Sedgworth* v. *Spicer*, 1 *East*, 570; *Greggen* v. *White*, 4 *Taunt*. 881. *Bac*. Abr. Attorney, H.

Attorney cannot be struck off the roll on his own motion, though he has never practised, without an affidavit that no proceedings are pending against him for misconduct.

An attorney cannot be struck off the roll on his own motion, although he has never practised, without an affidavit that no proceedings are pending against him for misconduct. *Anonymous*, *Trin*. T. 1815, *May* 26th. *Moore* moved for a rule to shew cause why an attorney (who was about to enter into holy orders) should not be struck off the roll; and he grounded his motion on an affidavit that he had never practised as an attorney, which it was contended was sufficient, without the usual clause that no proceedings were pending against him for misconduct. *Dampier* J. The usual form must be adhered to, and unless there is an affidavit that no proceedings are depending against the attorney for misconduct, the rule cannot be granted. Rule refused accordingly. Vide *Tidd*, 6th ed. 80.

Attorney struck off the roll after conviction for a conspiracy.

An attorney will be struck off the roll after conviction for a conspiracy. *Anon*. *Mich*. T. 1813, *Nov.* 8th. *Puller* moved for a rule to shew cause why the defendant should not be struck off the roll of attorneys. He had been convicted at the *Gloucestershire* Summer Assizes, before *Dampier* J. of a conspiracy. The motion was grounded upon an examined copy of the conviction, and an affidavit of the defendant's having practised since the conviction, and of his identity. The Court granted the rule *nisi*.—So where an attorney had been convicted on an indictment, for threatening to put in motion a prosecution by a public officer to recover penalties for selling unstamped medicines, for the purpose of obtaining money to stay the prosecution, and the Court, on a motion in arrest of judgment, thought that the offence charged was not indictable; it was nevertheless held, that the attorney ought to be struck off the roll. The *King* v. *Southerton*, 6 *East*. 126. The striking off an attorney for an offence committed, is not done with a view of punishing the individual, but on the ground that the

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of clerkship were assigned. He had stuck up in *Westminster Hall*, and had entered in the books at the Judge's chambers, the usual notices of his intention to apply to the Court for admission, but from accident he omitted to insert in the notices the name of the assignee of his articles. It was submitted, however, that this was not a sufficient objection to his admission, it being a mere mistake, and not arising from any intentional omission.

The COURT, upon reference to the Master, said, that if they were to suffer the admission of the appli-

delinquent is not a proper person to be continued an attorney: and where an attorney had been convicted of felony five years before the application, and had been burned in the hand, it was held that he could not be continued on the roll. *Exparte Brounsal, Cowp.* 829.

Attorney who had been struck off the rolls on conviction for seditious practices, and was afterwards pardoned, not allowed to be restored to the roll on ground of want of experience.

Under such circumstances, if the attorney apply for readmission, he must satisfy the Court that he ought to be restored. *Exparte Frost, Wednesday, Feb.* 8th. *Hil.* T. 1815. *Adolphus* moved to restore an attorney who had been struck off the roll on conviction for seditious practices, and had afterwards received a pardon. It was contended, that the offence was cleared, and consequently the party was entitled to be readmitted; but the *Court* rejected the application. They said they could discover no reason for reinstating this gentleman in the office of attorney; and the want of experience arising from his having discontinued practice, was, independently of the other circumstances, a sufficient ground for not acceding to the motion. *Per Curiam.* Rule refused. See also *Tidd,* 6th ed. 80. 1 *Chitty,* C. L. 811.

Rule *nisi* granted to discharge articled clerk when the attorney to whom he was bound had become a bankrupt and absconded. Rule directed to be served at the last place of abode of the attorney, on the clerk to the commission of bankruptcy, and also be stuck up in the King's Bench Office.

The Court have granted a rule to discharge an articled clerk, where the attorney to whom he was bound had become a bankrupt, and had absconded. The rule was directed to be served at the last place of abode of the attorney, on the clerk to the commission of bankruptcy, and also to be stuck up at the King's Bench Office. *Anon. Mich.* T. 1815. *Nov.* 7th. *A. Moore* moved that the clerk of an attorney might be discharged from his articles of clerkship, on an affidavit that his master, the attorney, had become a bankrupt and absconded to foreign parts, and had failed to surrender himself under the commission of bankruptcy issued against him. *Le Blanc* J. said that it must be a rule *nisi* only, in order to give the other party an opportunity of answering the affidavit; and doubts being raised as to where the rule should be served, he directed it to be served at the last place of abode of the attorney, and on the clerk to the commission of bankruptcy, and that it should also be stuck up in the King's Bench Office. Rule *nisi* granted, and directed to be served as above-mentioned.

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cant under the circumstances stated, it would be in effect annulling the rule, which required the notices to state with whom the party had served his clerkship. In this particular case it was the more requisite that the applicant should have inserted in his notices the name of the assignee of his articles, because the latter part of his time, which was the most important, would have been served with the assignee. Admission refused until the rule of Court should have been complied with.

JOHNSON *against* CLOSS.

Tuesday, June 29th.

Where a rule *nisi* is obtained and is silent as to costs, and on showing cause the opposite party applies to the Court for costs which are refused, and the rule is discharged without any mention of costs, and the opposite party afterwards obtains a verdict, the costs of the opposition are costs in the cause, to which he is entitled. (*a*)

HUTCHINSON on a former day obtained a rule, calling upon the plaintiff to shew cause "why the master should not be at liberty to review his taxation of the costs on the *postea* in this cause, and why the costs of two discharged rules, which had been allowed on such taxation, should not be deducted; and why, in the mean time, proceedings on the execution should not be stayed." It appeared from the affidavits, that two rules *nisi* had been obtained by the defendant in the course of the cause, by one of which the plaintiff was called upon to shew cause why the defendant should not be discharged on entering a common appearance. The other rule was obtained for the purpose of staying proceedings in the cause, and procuring the undertaking on which the action was brought to be delivered up to be cancelled, on the defendant's paying the money alleged to be due thereon into Court, to abide the event of any issue which the Court might direct. The rules *nisi* were not moved for with costs, nor was any mention made of costs in the rules by which the same were discharged. However, when the rules *nisi* were discharged, the plaintiff's

(*a*) See *Tidd*, 6th ed. 528, *ante*, 399, and notes.

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counsel applied to the Court for costs; but the Court rejected the application, and observed, that the plaintiff had no reason to be dissatisfied. Under these circumstances, the plaintiff having afterwards obtained a verdict, the costs of opposing the two rules were allowed by the master on taxation as costs in the cause; and it was now contended on the part of the defendant, that these costs had been improperly allowed, and that as the Court had expressly refused to accede to the plaintiff's application for costs when the rules were discharged, the costs of opposing the two rules obtained by the defendant ought not to be allowed as costs in the cause. But

The COURT held that there was no ground for reviewing the master's taxation, and as the rules had been discharged without any mention of costs, the costs incurred by the plaintiff in opposing the rules had been properly allowed as costs in the cause. Rule for reviewing the taxation discharged, but without costs.

Gurney and *Puller* shewed cause.

Wednesday, June 30th.

In the matter of JONES, *an Insolvent Debtor.*

Notice under the Lords' Act by leaving it with agent of the plaintiff's attorney, and with a shopman at plaintiff's warehouse in town when he resides in the country, held sufficient, the agent having appeared according to the notice, and opposed discharge. (*a*)

THIS defendant came up to be discharged under the Lords' act, having given notice to his detaining creditor, who resided at *Nottingham*, by serving it

(*a*) The Lords' act, 32 *Geo.* 2. *c.* 28. *s.* 13. directs, that before the petition shall be received by the Court, every such prisoner or prisoners shall give or *leave*, or cause to be given or left *unto or for* all and every the creditor or creditors, at whose suit any such prisoner or prisoners shall stand charged in execution as aforesaid, or his her or their executors or *administrators*, *and at his her or their usual place of abode* (or to or for his her or their

upon a shopman of the plaintiff carrying on the plaintiff's business at his warehouse in *London*, and also serving a similar notice upon the agent of the plaintiff's attorney.

D. Pollock objected that this notice was not sufficient, contending that it should have been served upon the plaintiff at *Nottingham*, where he resided. He had been instructed in consequence of the notice having been served upon the agent of the plaintiff's attorney, but it did not follow that the plaintiff had had notice.

Comyn, on behalf of the prisoner, contended that the appearance of the agent of the plaintiff's attorney cured the objection; besides which, the notice had been served upon the plaintiff's shopman, who appeared to act in the management of his business in *London*.

attorney or agent last employed in any such action, suit, cause or causes, in case any such creditor or creditors, his her or their executor or executors or administrators cannot be met with, but not otherwise,) fourteen days at least before the petition shall be presented and received, a notice in writing, &c. The petition, gaoler's certificate, and affidavit of the service of notice being left with the clerk of the rules in K. B. he will draw up a rule for bringing the prisoner into Court and summoning the creditors to appear personally or by attorney at some certain day therein specified. 32 *Geo.* 2. *c.* 28. *s.* 13. This rule need not, it seems, be *personally* served, *Tidd.* App. 175. Prac. 6th ed. 379. It is stated to have been holden, that notice of a prisoner's intention to apply for his discharge in the Court of K. B. instead of C. P. is not cured by the plaintiff's opposing his discharge. *Scholey* v. *Mansell*, 2 *Taunt.* 64; and see 2 New Rep. 67, *Knight* v. *Fowler*. It has been determined, however, that where a party appears to a rule served upon him, any irregularity in the service of the rule is cured. *Noel* v. *Eyre*, *Tidd*, 525.

Notice of coming up to take the benefit of the Lords' Act entitled, "*Doe* dem. *A. B. and others* against *C. D.*" without specifying the christian and surnames of all the parties, held sufficient.

The notice is sufficient though it do not specify the christian and surnames of all the parties. In the matter of *Gates*, *Thursday*, *Nov.* 27th, 1818. *Gates*, an insolvent, was brought up to take the benefit of the Lords' act. His notice of coming up was entitled "*Doe* on the demise of *Gosling and others* against *Gates*." *Espinasse* objected, that the rule of Court required that the christian names of the parties should be inserted in the title of all affidavits or proceedings in Court, and that it was therefore insufficient to say "*Gosling* and others," without specifying their names. *Le Blanc* J. held, that it was not necessary to entitle the notice with the christian and surname at length; and the master, on being referred to, said that it was not usual so to entitle the notices. Objection overruled. See *Tidd's* App. *ch.* 16. *s.* 49

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In the matter of JONES.

HOLROYD J. was of opinion, that inasmuch as the agent of the plaintiff's attorney appeared in consequence of the notice served upon him, there was no defect in the proceedings. And the prisoner obtained his discharge under the notice.

Wednesday June 30th.

BROMLEY *against* FOSTER.

The rule for judgment expires in four days, computed exclusively of the first and last of *Sunday* and *Midsummerday*, and other *dies non*. Clerical errors and bad spelling are not a sufficient ground for rejecting an affidavit; but although the Court set aside the proceedings, and the proceedings had been before set aside, yet they imposed the terms that no action should be brought. (*a*)

COMYN on a former day obtained a rule calling on the plaintiff to shew cause why the writ of *fieri facias* in this case, and all subsequent proceedings, should not be set aside for irregularity, with costs.

Campbell now appeared to shew cause, and submitted, that in all events the plaintiff was not entitled

(*a*) The object of the rule is, that the defendant may have an opportunity of moving the Court in arrest of judgment, &c. and therefore *Sunday*, or a day on which the Court does not sit, is not one of the four days which the rule contemplates. *Rex* v. *Elkins*, 4 *Burr.* 2130; *Roberts* v. *Stacey*, 13 *East.* 21; 11 *East.* 272, note (*b*); 6 *Mod.* 241; *Tidd*, 6th ed. 925.

Clerical errors such as "defendant" instead of "deponent," "court" instead of "office," held immaterial in an affidavit where the meaning was clear; *aliter* where the mistake leaves the meaning doubtful.

Clerical errors, and mistakes in spelling, are not considered a sufficient ground for rejecting an affidavit, where the meaning is clear. *Anonymous. Easter* T. 1815. *May* 8th. *Walford* took an objection to an affidavit, that in one part it ran, and "this defendant," instead of "this deponent." *Sed per Curiam.* It is immaterial, we shall read it according to its sense. *Walford* then objected, that it swore the declaration was taken out "of the Court," instead of out "of the office." And the *Court* immediately overruled that objection also.

An affidavit stating that the deponent served a party with a "true," omitting the word "copy," of the declaration in ejectment, is bad.

Anonymous. Easter T. 1813, *May* 31. *Jones* moved for judgment against the casual ejector, on an affidavit that the deponent had served the defendant with a "true," omitting the word "copy," of the declaration. *Sed per Curiam.* This affidavit will not do; it might have been a true account. Rule refused. See *Rex* v. *Taylor*, 1 *Campb.* 404; *Rex* v. *Duffe*, 2 *Campb.* 140, 1.

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to sustain his rule, inasmuch as the affidavit upon which it had been obtained was full of clerical errors and orthographical mistakes.

The COURT however said, that there being enough of intelligible matter in the affidavit, they would allow the case to proceed.

Campbell then shewed cause. From the affidavits it appeared, that on the 19th of *June* the plaintiff obtained judgment against the defendant for not producing the record of an action of debt, as required by a rule of Court; and on *Friday* the 25th of the same month, he taxed the costs and sued out execution. The irregularity, he understood, which was complained of in this proceeding was, that there were not four clear days between the rule for judgment and the time of entering it up; but he submitted, that this was no irregularity, for although a *Sunday* had intervened, as well as the 24th of *June*, which was a *dies non*, still those ought to be computed, and if so there were four clear days, exclusive of the first and the last, before the judgment was entered up.

Comyn, in support of the rule, contended, that the *Sunday*, and the *24th of June, Midsummer day*, which intervened, could not be computed, and referred to *Roberts* v. *Stacey*, (*a*) where it was held, that the rule for judgment must have four clear days, exclusive of the first and last, and of *Sunday*, before judgment is entered. He submitted, therefore, that in this case the plaintiff's proceedings were clearly irregular, and contended, that in making the rule absolute the Court ought not to impose upon the defendant the term of bringing no action; because it appeared from the affidavits, that a previous judgment had already

(*a*) 13 *East*. R. 21.

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been set aside for irregularity, and that the defendant's goods had been sold under the execution now complained of.

The COURT said they would make the rule absolute upon the terms of the defendant's bringing no action, it appearing that the judgment had been entered up in the manner complained of, merely by mistake.

Rule absolute.

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BONES *against* BUNTER.

To support a motion for leave to sign judgment for want of a plea, on ground that improper false pleas have been pleaded, there must be an affidavit of the untruth of the pleas. But upon shewing cause, leave was given to file such affidavit on payment of costs of opposition. If such pleas have been pleaded under a rule to plead double, it is not necessary first to move to set aside such rule. (*a*)

CHITTY on a former day obtained a rule to shew cause why the plaintiff should not be at liberty to sign judgment as for want of a plea, the defendant

Rule granted for judgment as for want of a plea, where a sham plea was pleaded, the issues on which require two different modes of trial.

(*a*) See *Idle* v. *Grutch*, *ante*, 521. The following cases relate to the practice of setting aside a sham plea. *Anon. Hil.* T. 1815, *Feb.* 10th. *Heath* moved for judgment as for want of a plea; the defendant pleaded a plea of set-off on recognizance, as to part, and on bond as to the remainder. He contended that as this required a replication, on which there would be two issues, one to be tried by the record, and the other by the country; and as an affidavit was made of its being a sham plea, the Court would grant this motion as a matter of course. Rule *nisi* granted. *A. Moore* shewed cause. Although the plaintiff had filed an affidavit denying the plea, yet he had not called upon the defendant to verify the plea. This is distinguishable from *Blewitt* v. *Marsden*, 10 *East*, 237. where the defendant pleaded a judgment recovered in the Piepoudre Court. Here the plaintiff might have replied *nul tiel* recognizance, and *non est factum*. *Sed per Le Blanc* J. that is just what the defendant wished. The only cause to be shewn against this application is to verify the plea. The Court will not support these sham pleas; they are novel devices. Rule absolute.

So in *Munton Extrix.* v. *Mockett*, *Mich.* T. 1816, 25th *Nov.* *Merewether* obtained a rule *nisi* for judgment as for want of a plea, where the defendant had craved oyer of the bond and condition on which the action was brought, and of the letters testamentary, the action being by an executrix. The date of the letters testamentary was 8th of *April* 1815, and the plea of set-off, of a recognizance in Common Pleas, and a judgment

having pleaded false pleas, tending issues requiring different modes of trial, and why the defendant should not pay the costs of the application. The action was

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in *Ireland*, were both pleaded as of *Trinity* Term 1815. He obtained a *rule nisi* on the ground that this would require a double replication, and on the authority of *Solomons* v. *Lyon*, 1 *East*, 369; *Blewitt* v. *Marsden*, 10 *East*, 237; *Hopgood* v. *Wright*, 2 New Rep. 188; *Penfold* v. *Hawkins*, 2 *M.* & *S.* 606. He observed, that an *Irish* judgment may be pleaded as a record, but the replication must conclude to the country. *Collins* v. Lord *Mathew*, 5 *East*, 473. On 30th *Nov.* the rule was made absolute without opposition.

Held that after a rule to abide by the plea, the plaintiff cannot sign judgment as for want of a plea without an application to the Court, although such a rule will not prevent the Court from allowing the plaintiff to sign judgment.

It has been held, that where the defendant has been ruled to abide by his plea, the plaintiff cannot sign judgment as for want of a plea without an application to the Court. *Draycott* v. *Pikington*. *Mich.* T. 1816. *Marryat* shewed cause against a rule obtained by *Chitty*, to set aside a a judgment, signed as for want of a plea. The action was brought in debt on bond. Plea—set-off of money due on bond, recognizance, and simple contract. A rule to abide by the plea had been obtained. He contended that the rule made no difference, and that they being sham pleas he was entitled to sign judgment in the same manner as in the case of frivolous pleas in abatement; and he cited *Penfold* v. *Hawkins*, 2 *M.* & *S.* 606. *Chitty*, contrà, distinguished this case from that cited, that being an action of debt, and the plea framed in *assumpsit*; and he said plaintiff might reply *non est factum*, *nul tiel record*, and *non assumpsit*, and referred to a precedent in *Richardson's* Prac. 1 vol. He also relied on the terms of the rule by which the defendant was to abide by his plea, which admitted that there was a plea on the record, which the plaintiff could not afterwards treat as no plea. He observed, that the party had improperly signed judgment without applying to the Court. Lord *Ellenborough* Ch. J. (after conference with the other judges.) The Court entertains no doubt but that this is a sham plea; and if it had not been for the rule on the defendant to abide by his plea, we should have deemed it a nullity; but as against a party who has treated the plea as a valid one, we are precluded by the terms of the rule from saying that it is no plea. *Rule absolute*, without costs.

So in *Duberly* v. *Phillips*. *Mich.* T. 1816. *Gifford* shewed cause against a rule obtained by *Chitty*, to set aside a judgment signed as for want of a plea. He admitted that there was a rule to abide by the plea, but endeavoured to distinguish this from the other case ruled the same morning, (*a*) because this was really no plea. Lord *Ellenborough* Ch. J. The misfortune is, that you yourself have treated it as a plea by your rule to abide by the plea, and therefore the rule must be made absolute, but without costs. In the case of *Thomas* v. *Vandermoolen*, 2 *B.* & *Ald.* 198. on an application to the Court for a rule to sign judgment as for want of a plea, it was held, that the plaintiff might be allowed to sign judgment, although he had obtained a rule to abide by the plea, which in fact puts the defendant on his guard; for the rule leaves it to the party to abide by his plea or not, as he thinks proper, and if he abides by it he must do so subject to all its consequences.

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upon a bill of exchange; and the defendant pleaded to the whole declaration, first, a judgment recovered in the Common Pleas; and secondly, as if by leave of the Court, the delivery of a hogshead of tobacco in satisfaction.

Bingham, on the 26th instant, shewed cause, and objected that the motion could not be sustained because there was no affidavit falsifying the truth of the plea, and insisted that the Court could not judicially take notice that the plea was false. *Chitty* then submitted, that these pleas, tendering two different issues, one to be tried by inspection of the record and the other by the country, were obviously false, and the Court would read them so. But the Court said that they could not take judicial notice of the falsehood of the pleas, and that there ought to have been an affidavit denying the truth of the pleas. But the Court enlarged the rule until this day, in order that the plaintiff might produce a proper affidavit, upon payment of costs to the defendant, of his shewing cause on such former day. Since the first application the defendant attempted to abandon his pleas, and pleaded the general issue, but had not been served with a rule to abide by his plea. *Chitty* now produced an affidavit of the falsity of the pleas, and prayed that the rule might be made absolute for leave to sign judgment as for want of a plea, urging that the defendant could not abandon his former pleas and plead the general issue, so as to elude the effect of this rule.

Scarlett, for the defendant, admitted that the pleas objected to were sham pleas, but contended that as a rule to plead double had been obtained, and the pleas were framed according to such rule, the plaintiff ought to have moved to discharge such rule before he made the present application. But

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THE COURT said that the pleas being now established to have been false, and improperly leading to two modes of trial, the plaintiff was entitled to sign judgment. That the rule to plead double is obtained as a matter of course in this Court, and the Court itself had not in fact given leave to plead these pleas. The rule to plead them had been improperly obtained, and the present motion was in effect for leave to sign judgment notwithstanding such rule.

Rule absolute.

THE KING *against* THE SHERIFFS OF LONDON.

Wednesday June 30th.

Where defendant was rendered after the time for putting in bail had expired, but within the further time allowed him for that purpose by the Court, Held, that an attachment issued after notice of such render was regular and could not be set aside without an affidavit of merits, especially as no bail-bond had been taken. (*a*)

THIS was a motion to set aside an attachment issued against the sheriffs, with costs, for irregularity; the irregularity complained of being, that the attachment issued after the render of the defendant in the original action.

Attachment against Sheriff for not bringing in the body will not be set aside with costs when render was too late. There must be an affidavit of merits, or that the application is made on behalf of the bail or of the sheriff, in order to set aside the attachment. (*b*)

(*a*) See also *Anonymous. Mich.* T. 1815. *Nov.* 23d. *Adolphus* moved for a rule to shew cause why an attachment issued against the sheriff should not be set aside, and why the plaintiff should not pay the costs of this application. The circumstances were as follow:—Two days further time had in the first instance been allowed the defendant to justify his bail, and eventually the bail were rejected; but the defendant had rendered at ten o'clock on the same day. Therefore as the defendant had rendered, it was contended that the Court would grant a rule for setting aside the attachment. *Bayley* J. You were too late with the render, and therefore it is impossible that this rule can be granted with costs. Besides, it does not appear that there is an affidavit of merits, or that the application is made on behalf of the bail or of the sheriff; and without one or other of these facts being sworn to, you cannot have the rule for setting aside the attachment. The rule was accordingly refused. See *Reg. Gen.* 2 *Barn.* & *Ald.* 240. Where the sheriff has been guilty of a breach of duty in discharging the defendant out of custody without the plaintiff's assent, upon his own undertaking to appear and put in bail, instead of taking a bail-bond, the Court will not assist him by staying the proceedings in an action for an escape, or by setting aside the attachment. *Fuller* v. *Prest*, 7 T. R. 109; The *King* v. The *Sheriff* of *Surrey*, *id.* 239; 6 *Taunt.* 554; 2 *Marsh.* 261; *Tidd*, 6th ed. 307. See *Brown* v. *Gillies ante*, 496.

(*b*) See *Reg. Gen.* 2 *Barn.* & *Ald.* 240.

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Comyn now shewed cause upon an affidavit; and in the first place, stated, that the sheriffs had taken no bail-bond, nor did the affidavit upon which the motion was made swear to merits;—that the time for putting in bail in the original action had expired on a *Monday*, but upon application to the Court; further time was given until the *Tuesday*, as a matter of indulgence, but on that day the bail did not justify;—that the render was made about ten o'clock on the morning of that day, and that notice of render was served upon the plaintiff's attorney about half past twelve o'clock, but after that notice the attachment was issued. Under these circumstances, it was submitted that the attachment was perfectly regular, and could only be set aside as matter of favour; but that here the sheriff was not in a condition even to ask this favour, because the affidavit did not swear to merits, nor had the sheriff taken any bail-bond. The rule for putting in and justifying bail had expired on the *Monday*, and the defendant was only rendered on the *Tuesday*, on the morning of which day the bail might have justified, if they were in a condition so to do; but having neglected to avail themselves of the indulgence granted by the Court, the plaintiff was entitled to move for an attachment on that morning, and the notice of render was then too late. In a case of *Calvert* v. *Munroe*, *Mich.* T. 1818, which was precisely under similar circumstances, the Court held that the attachment was regular. In that case, the bail did not justify in time, and the defendant being rendered on the following day, notice was served of the render on that day; but the Court said that the plaintiff ought not to be delayed in his proceedings, and was entitled to his security by attachment against the sheriff, because the party did not put in bail in time. It was true, that the practice of the Court had been, that if a party had been rendered the day after the time for putting in

bail had expired, they would, on payment of costs and swearing to merits, set aside the attachment against the sheriff; but here there was no affidavit of merits, and, in point of fact, the sheriff had taken no bail-bond. It was clear, therefore, that there was no irregularity, and consequently the rule must be discharged with costs. He referred to *Howe* v. *Lacey*. (a)

Campbell, in support of the rule, contended that upon the facts stated in the affidavits produced on both sides, the attachment was irregular. It was true, the time for justifying bail was out on the *Monday*, and on that day the defendant was actually present in the Bail Court, ready to have rendered, and would have rendered if the Court had not granted time until the following day to justify his bail, for which purpose a rule had been drawn up and regularly served upon the plaintiff's attorney. The effect of that rule, he submitted, was to give the defendant the whole of *Tuesday* to render or justify his bail. It happened that the bail could not justify on that day, and consequently the defendant rendered, notice of which fact was served upon the plaintiff's attorney; and, under these circumstances, he contended that the attachment issued on the afternoon of that day, subsequent to notice of render, was irregular; and he referred to The *King* v. The *Sheriff* of *Middlesex*, (b) where it was held, that an attachment against the sheriff for not bringing in the body, after the defendant has surrendered, is irregular, though the surrender be not made until after the rule for bringing in the body has expired.

ABBOTT C. J. If there had been no time given on the *Monday* for the bail to justify on the *Tuesday*, the plaintiff might have moved for an attachment

(a) 1 *Taunt*. 119. (b) 2 *M*. & *S*. 562.

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early in the morning of *Monday*. The object of giving time is, that the plaintiff may know whether the bail of whom notice has been given are fit persons to justify. In this case it appears that the sheriff has in effect, in the first instance, discharged his prisoner by not having taken a bail-bond; and the question is, whether he is entitled to any favour after that fact is disclosed. It seems to me that that is a very unfavourable circumstance in the case, and entitles him to no indulgence. Time is frequently given as a matter of favour to a defendant, in order to enable him to perfect his bail on the one hand, and to the plaintiff, to inquire into the sufficiency of the bail on the other. Whatever may be the effect of a rule for allowing further time to put in bail in general, I do not consider it tantamount to the putting in of bail, so as to entitle the bail to render the principal. The bail in this case were not put in in time, and the rule for allowing further time is not to be considered of any operation, until they are put in at the proper time. Here they were not put in in proper time, and I think the plaintiff was regular in moving for the attachment; and, though the render might be regular in the mean time, yet the motion for the attachment might be made early in the first day, if further time had not been given

BAYLEY J. As no bail-bond was taken by the sheriff, and as the defendant was bound to put in bail on the *Monday*, the render was out of time on the *Tuesday*, and therefore I think the attachment was regular.

HOLROYD J. and BEST J. concurred.

Rule discharged with costs.

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THE KING *against* HARRISON.

Wednesday, June 30th.

The Court will not grant a *certiorari* on behalf of the defendant to remove an indictment from the sessions, on an affidavit that he was advised that difficult points of law might arise. (*a*) But leave was given to renew the motion at chambers, if a better affidavit could be obtained.

THIS was an indictment found at the *Lancashire* Sessions against the defendant, for disobeying an order of maintenance; and

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(*a*) It seems that at least the points of law which it was conceived might arise should have been stated, so that the Court might have been enabled to judge of the reasonableness of the defendant's prayer. In *Nehuff's* case, 1 *Salk.* 151. where a *certiorari* was sought for to remove an indictment at the *Old Bailey* for a cheat, and the case was that the defendant borrowed 600*l.* of a feme covert, and promised to send her fine cloth and gold dust as a pledge, and sent no gold but some coarse cloth worth little or nothing, and the defendant offered to try the indictment the same Term, which would be a benefit to the prosecutor, who by the course of proceedings at the *Old Bailey* could not try it so soon, the Court granted a *certiorari* because there was no criminal offence but only a breach of confidence on the part of the defendant, and the defendant was therefore entitled to the *certiorari* because it was an absurd prosecution and the defendant offered to try it in that Term.

The Court have granted a *certiorari* to remove an indictment from the *Old Bailey* where the defendant was a public officer whose duties required his attendance at a great distance from the metropolis. *Anon. East.* T. 1815. *May* 3d. *Gurney* moved for a *certiorari* to remove an indictment from the *Old Bailey*, in order that the defendant might be tried at *Gloucester*, where he resided, and where he held the office of Deputy Register of the division of *Gloucester*. The defendant was indicted for using improper influence with the jury in order to promote an action for his fees. This motion was made on the ground of the distance at which the defendant lived from *London*, where the indictment was intended to be tried; the hardship which was imposed on the defendant in his being obliged to come up twice, once for pleading and another time for trial; and the inconvenience which would result therefrom on account of the defendant being a public officer. The *Court* said they were afraid that this would lead to a precedent for removing every indictment from the *Old Bailey*, where the party resided more than a hundred miles from *London*. But on the ground of his being a public officer, and such an officer as a deputy register, whose personal attendance is daily necessary for the purpose of granting probates, &c. the *certiorari* was granted. See 1 *Chitty's* Cr. L. 375.

Certiorari granted to remove an indictment from the *Old Bailey* where the defendant was a public officer and lived at *Gloucester*.

It is not a sufficient ground for the issuing of a *certiorari*, that prejudices existed against the defendant, unless there was some prejudice in the Court below. *Rex* v. *Matthews*, *East.* T. 1815. *April* 27th. *Reader* moved for a *certiorari* to remove an indictment for compounding an action

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THE KING *against* HARRISON.

Starkie moved for a *certiorari* to remove the proceedings into this Court, upon an affidavit of the defendant, stating that this was an unusual proceeding, that he was advised that several matters of law of the greatest importance would arise upon the trial of the indictment, and that it was fit and proper it should be tried before persons learned in the law.

HOLROYD J. (*a*) You must have a stronger affidavit than this to entitle the defendant to a *certiorari*; and if one can be obtained, the motion may be renewed at chambers.

Rule refused.

for penalties for carrying too many passengers by a coach, on the ground of prejudice against the defendant. Lord *Ellenborough* Ch. J. It is not a sufficient ground, unless you state that some prejudice existed in the Court below; and as no such ground is shewn, the rule must be refused.

(*a*) The only Judge in court.

Wednesday, June 30th.

BELL *against* TAYLOR.

On motion to set aside an attachment or stay proceedings on the bail-bond, when an affidavit of merits is produced, it is not necessary to state on whose behalf the motion is made. (*b*)

COMYN moved to set aside the proceedings on the bail-bond in this case, upon an affidavit of merits.

(*b*) In the case of the *King* v. the *Sheriff* of *Middlesex*, 3 *M.* & *S.* 299. the rule laid down by Lord *Ellenborough* and the Court was, that where an application is made to set aside a regular attachment against the sheriff, the Court will require *either an affidavit of merits*, or that the application is made on behalf of the sheriff or the bail, without collusion with or indemnity from the defendant. See also the *King* v. the *Sheriff* of *Surrey*, 7 T. R. 239. The general rule, however, is drawn up in the following terms. 2 *B.* & *Ald.* 240. "It is ordered, that from and after the last day of this present Term, no rule shall be drawn up for setting aside an attachment regularly obtained against a sheriff for not bringing in the body, or for staying proceedings regularly commenced, on the assignment of any bail-bond, unless the application for such rule shall, if made on the part of the original defendant, be grounded upon an affidavit of merits; or (if made on the part of the sheriff, or bail, or any officer of the sheriff) be grounded upon an affidavit showing that such application is really

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Hutchinson shewed cause against the rule, and contended that the rule could not be made absolute inasmuch as the affidavit did not state on whose behalf the motion was made.

PER CURIAM. It is immaterial on whose behalf the application is made to set aside an attachment, or proceedings on the bail-bond, if an affidavit of merits is produced.

Rule absolute.

and truly made on the part of the sheriff, or bail, or officer of the sheriff, (as the case may be) at his or their own expence, and for his or their only indemnity, and without collusion with the original defendant. By the Court."

DOE *on the Demise of* —— *against* ROE.

Wednesday, June 30th.

The notice to appear in ejectment must contain the Christian name of the tenant in order to ground the rule for judgment, and it is not sufficient to swear to the identity of the person served. (*a*)

ADOLPHUS moved for judgment against the casual ejector, on an affidavit, stating that the deponent had served Mrs. *Hicks*, the tenant in posses-

The second name of the tenant in possession, both in the declaration and notice, in an action of ejectment, may be in initials.

(*a*) See *Doe* dem. *Bane* v. *Hurst*, *ante*, 162. But a rule for judgment has been granted where the defendant's name was abbreviated, as where the name in the notice was written *John B. Jones* instead of *John Benjamin Jones*. *Anon. Trin.* T. 1818. *June* 4th. *Mence* moved for judgment against the casual ejector, the second name of the tenant in possession in the declaration and notice being in initials, as *John B. Jones*, for *John Benjamin Jones*. *Sed per Abbott* J. I think it is sufficient. Rule for judgment accordingly.

Judgment granted against the casual ejector, though the real defendant's name was inserted at the beginning of the declaration instead of the casual ejector; but it seems better to amend.

The Court will grant a rule for judgment against the casual ejector, although the defendant's name is inserted in the commencement of the declaration instead of that of *Richard Roe*; but it seems expedient to amend. *Anon. Trin.* T. 1816. *June* 20th. *Adams* moved for judgment against the casual ejector, on the usual affidavit of service. The declaration commenced by stating that *J. Mills* (the real defendant) was attached to answer, &c. and afterwards used the name of the casual ejector (*Roe*) throughout the remainder of the declaration. *Holroyd* J. You may have your judgment; but it is worth your consideration whether it will not be adviseable to amend, for if the defendant should think fit to move he may probably set aside the proceedings. See *Adams* on Eject. 2d edit. 201.

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Doe *against* Roe.

sion, widow of *Jeremiah Hicks*, by delivering the copy of the declaration to her personally: but the notice to appear merely described her as Mrs. *Hicks*, without any Christian name. He submitted, that such an affidavit would entitle the plaintiff to judgment, inasmuch as the defendant's person was sworn to as being the tenant in possession; urging, that as she was a widow and only known commonly by the name of Mrs. *Hicks*, the Christian name would not be necessary in such a case.

Holroyd J. I do not think this sufficient service of the ejectment. I am of opinion that the Christian name as well as the surname should be introduced into the notice, as well as comprised in the affidavit of service. It is suggested that the service was made upon the tenant in possession, and that her person is sworn to; but I am inclined to think that this is not even sufficient for a rule to shew cause.

Adolphus took nothing by his motion.

Wednesday, June 30th.

Doe *against* Roe.

The affidavit to ground a rule for judgment against the casual ejector, must state that the person served was tenant in possession. (*a*)

TURTON moved for judgment against the casual ejector, on an affidavit stating that the deponent served the copy of the declaration upon the person

When the tenant in possession has just died and a servant is in possession, the plaintiff should endeavour to get possession, and if the servant resists he should be treated as tenant.

(*a*) See *Doe* v. *Stradling*, 2 *Stark.* 187; *Doe* v. *Staunton*, *ante*, 118. See also *Anonymous. Mich.* T. 1816. *Nov.* 8th. *Tindal* moved for judgment against the casual ejector on an affidavit, which stated in substance that the tenant in possession had died but a very short time ago, that he had no wife, that no administration had been taken out, and that his goods were in the house, and a servant in possession. The notice at the foot of the declaration was addressed to the tenant in possession, or his personal representatives, and the service thereof was on the servant in possession. *Sed per Holroyd* J. I think it is insufficient; some other course must be taken. Perhaps the lessor of the plaintiff had better endeavour to get possession; and if the servant who is in possession resists, the plaintiff had better treat him as tenant, and serve him with a declaration, with

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who appeared to be in possession of the premises therein mentioned, it being positively sworn, that the said person was the eldest son and heir at law of the mortgagor of the premises, but it omitted to state that he was the *tenant* in possession.

ABBOTT Ch. J. This is not sufficient. There is a certain form prescribed by the Court for affidavits in these cases, which must be conformed to. If in this case we allow a departure from that form, we shall have still greater errors. The word *tenant* is a most material expression, and if we dispense with its introduction into the affidavit, we shall upon some other occasion have the words "In possession" left out. The long established practice of the Court requires that it shall appear upon the affidavit, that the party is the tenant in possession; for otherwise it might be that he was merely in possession and not the tenant, or *vice versa*, that he was the tenant but not in possession.

Rule refused.

notice addressed to him; and if he does not resist, perhaps you may then treat it as a vacant possession. *Tindal* submitted, that service on the solicitor of the deceased would be sufficient. *Sed per Holroyd.* I think not. Rule refused.

RICE *against* CHAMBERS.

Wednesday, June 30th

Procedendo cannot issue after service of the rule for the allowance of bail, on the ground that the plaintiff was called by a wrong name in the notice of bail, but the rule for the allowance should be first set aside. (*a*)

CHITTY on a former day obtained a rule to shew cause why the writ of *procedendo* issued in this case upon a judgment in the Lord Mayor's Court, should not be set aside for irregularity, with costs, and

(*a*) An action against the sheriff for an escape may be defeated by putting in bail in the original action, of the Term in which the writ was returnable (1 *M.* & *S.* 391), although after the expiration of the time allowed for putting in bail, and even after the action for escape is brought; for the rule for the allowance of bail, while it remains in force, imports that bail has been duly put in. *Murray* v. *Durand*, 1 *Esp.* 87; *Pariente* v. *Plumbtre*, 2 *Bos.* & *Pul.* 35; *Tidd*, 6th ed. 239, 240.

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why in the mean time all proceedings should notbe stayed. The affidavits in support of the motion stated, that the action was commenced and bail put in, in the Mayor's Court, and on the 12th of *May* the cause was removed by *habeas corpus* into the Court of K. B.; on the 17th of *May* bail was duly put in in this Court upon the *habeas corpus*, and notice was given thereof to the plaintiff's attorney, but there was a mistake in the notice with respect to the plaintiff's name, which was called *John* instead of *Joseph*. On the 18th of *May* the plaintiff gave a rule for better bail, in consequence of which notice was given of added bail, but the same mistake occurred with respect to the plaintiff's name as was committed in the former notice, the plaintiff being again called *John* instead of *Joseph*. On the 21st of *May* the added bail justified, and the rule for the allowance of bail was served in the evening of that day. Term ended on the 24th of *May*. On the 14th of *June* the *procedendo* issued; and under these circumstances the question was, whether the plaintiff ought not to have moved to set aside the allowance of bail before the issuing of the *procedendo*.

Marryat now shewed cause; and *Chitty*, in support of the rule, referred to *Murray* v. *Durand*, 1 *Esp. Rep.* 87. where Lord *Kenyon* said, "that by the rule for the allowance of bail, it appeared that the defendant had satisfied the exigency of the writ; bail above being put in, and having justified, that is now subsisting bail, and must be taken *nunc pro tunc*. The plaintiff should have applied to set aside the justification of bail, as while it subsists the action is not maintainable." These principles, which were laid down with respect to an action for an escape, were contended to be applicable to the present case, and shewed that no *procedendo*

could lawfully issue while the rule for the allowance of bail was in force.

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The COURT held that the rule for the allowance of bail ought to have been set aside before the issuing of the *procedendo*, and therefore the plaintiff had been premature in suing out that writ.

Rule absolute, with costs.

PROBINIA *and another, Assignees, &c. against* ROBERTS.

Wednesday, June 30th.

An action having been brought against the sheriff by the assignees of a bankrupt for taking goods after the bankruptcy, on a writ issued out of C. P., in which Court time had been given to return the writ, this Court staid the proceedings until an indemnity was given, on the terms of paying over to the assignees the money levied and the costs of the action against the sheriff. (a)

THIS was a rule calling on the plaintiffs to shew cause why all proceedings in this action should not be stayed, until the sheriff was indemnified to the satisfaction of the master. The case was this. The sheriff of *Middlesex* had levied upon the bankrupt's goods, after bankruptcy, under a writ of *fi. fa.* in an action brought in the Common Pleas, and he had applied to that Court to enlarge the time for making his return until the first day of next *Michaelmas* Term, and it was alleged that he had now the money in his hands; and the question was, whether this Court would order the plaintiffs in the present action to give him an indemnity against any proceedings that might be taken against him by the plaintiff in the cause in which the money was levied.

Comyn now shewed cause, and urged that the Court would not call upon the plaintiffs to give such an indemnity. The sheriff had levied upon the bankrupt's goods after the bankruptcy; and having done so at his own peril, it would be extremely hard on the plaintiffs, to call upon them to indemnify him for his wrongful act. The money was now in the sheriff's hands, and

(a) See *King* v. *Bridges*, 7 *Taunt.* 294; *Rainrs* v. *Nelson*, 2 *Bla.* Rep. 1181; *Shaw* v. *Tunbridge*, *id.* 1064; 3 *Camph.* 523; 1 *Stark.* 45; 7 T. R. 171; 1 *Taunt.* 120; 4 *id.* 585; 8 *Mod.* 315; *Tidd*, 6th ed. 1051.

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having obtained time in C. P. until next Term to return the writ, the plaintiffs were at liberty to proceed in their action, and the Court had no power to controul them.

Holt, in support of the rule, urged the hardship of the sheriff's situation. He was merely a ministerial officer, and had done his duty in executing the writ. This action was in fact brought against him to try the bankruptcy, and it ought not to be tried at his expence. The Court of Common Pleas had given him time until the first day of next *Michaelmas* Term to return the writ, and the principle upon which that indulgence was granted was precisely the same in this Court. (*a*) In all cases, the Court would interpose and prevent a question of bankruptcy being tried at the expence of the sheriff, particularly when he was willing to pay over the money to either party, upon being indemnified. The plaintiffs would not indemnify him, and were determined to go on with their action; and therefore he had no other remedy than to apply to the Court, and compel the plaintiffs to give him an indemnity.

Wilde, Amicus Curiæ, mentioned a case of *Butts* v. *Smith*, in which the party brought an action to recover a ship, and the proceedings were suspended for three years, until an indemnity was given to the sheriff.

The COURT said, that although it might be hard upon the plaintiffs to be called upon to indemnify the sheriff, yet it was still a greater hardship upon the sheriff to try the question of bankruptcy at his expence. The most reasonable way, however, of disposing of this rule, was to make the rule absolute for

(a) *Wells* v. *Pikman*, 7 T. R. 171.

indemnifying the sheriff, upon the terms of his thereupon paying the plaintiff and his attorney the costs of the action up to this time, and the money levied under the writ; and the plaintiff paying the sheriff the poundage and other expences incurred in the execution.

The rule was accordingly made absolute in these terms.

BARKLEY *against* FABER.

Wednesday, June 30th.

Although a detainer was lodged against the defendant pending a rule for discharging him out of custody, on the ground of a defect in the affidavit on which he was originally arrested, it was held, that the defendant was not entitled to be discharged from such detainer, there being no collusion, and the plaintiff in the second action not being acquainted with the circumstances of the original arrest.

CURWOOD on a former day moved to discharge the defendant out of custody on filing common bail, under the following circumstances. The defendant had been arrested at the suit of another plaintiff, and had applied to the Court to be discharged out of custody, on the ground of the insufficiency of the affidavit to hold to bail. (*a*) Pending the discussion of

(*a*) Vide *Tharlt* v. *Faber*. *Thursday*, *June* 17th, *ante*. In *Spence* v. *Stuart*, 3 *East*, 89. the attorney, by whom the detainer was lodged in the second cause, had been present at the reference at which the defendant was attending to be examined under a rule of Court, and was the attorney for the plaintiff in the cause which had been referred, although it was sworn that he knew nothing of the sheriff's officer's being about the house at the time of the defendant's being examined before the arbitrator (as the fact was), nor was concerned in the defendant's arrest in the first instance; but having been informed by his client, at whose suit the detainer was lodged of the arrest, which took place on the morning after the defendant had been examined, he had in consequence sued out a writ at his suit, and had lodged a detainer against the defendant at the sheriff's office in the course of the same morning. So that the plaintiff in the second action, and his attorney, had not been instrumental in procuring the first arrest, but only lodged a detainer against the defendant afterwards. But the Court said, that as the plaintiff's *attorney was cognizant of the occasion* on which the defendant was at the place where he was arrested, the rule must be made absolute with costs. In the principal case, it appears from the argument, that the plaintiff in the cause in which the detainer was lodged, and his attorney, had seen in the newspapers an account of the motion (which was ultimately successful) for discharging the defendant out of custody, on the

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that rule, which was made absolute, the plaintiff in this action lodged a detainer against the defendant, without any collusion with the original plaintiff, and the question was, whether the defendant could now be kept in custody upon the second detainer.

Gaselee and *Wilde* shewed cause against the rule, and contended that the defendant was not entitled to his discharge under the circumstances stated, it being po-

Defendant wrongfully arrested is not entitled to be discharged from *subsequent* detainers, unless there has been collusion between the plaintiffs in those causes and the person by whom defendant was originally arrested. (*a*) The Sheriff, and not the plaintiff, is subject to the costs of illegal arrest, unless plaintiff is privy.

ground of a defect in the affidavit; but it was nevertheless held, that the defendant was not entitled to be discharged out of custody in the second action. It has been before determined, that a defendant who has been wrongfully arrested is not entitled to be discharged from subsequent detainers, where there has been no collusion between the creditors at whose suit the defendant was detained and the person by whom he was originally arrested. It appeared, however, in the case in which this point was determined, that the detaining creditors were ignorant of the circumstances under which the original arrest took place. *Callaway* v *Bond. Mich.* T. 1815, *Nov.* 7th. The Attorney General moved for a rule to shew cause why the defendant should not be discharged out of custody in this action, on filing common bail, and why he should not be discharged from all other detainers, on the ground that the first arrest was illegal and malicious. The *Court* asked, if it could be proved that there was any collusion between the plaintiffs at whose suit defendant had been detained, and the person at whose suit he was originally arrested? And on the Attorney General answering in the negative, the *Court* said they could only discharge the defendant out of custody in that action in which he had been wrongfully arrested, and could not afford him relief in actions at the suit of persons by whom he had been afterwards detained. These persons found the defendant in custody, and treated him (as they had a right to do) as being properly in custody. The Attorney General desired that it might be for the plaintiff to pay the costs. The *Court* said, that in order to fix the plaintiff with the costs, it ought to be shown that he had a share in the illegal proceeding; but they would allow the Attorney General to take a rule to shew cause why the sheriff should not pay the costs. Rule *nisi* granted accordingly. *Abbott*, on a subsequent day, shewed cause against the rule obtained by the Attorney General; when the latter, in support of his rule, relied on the case of *Spence* v. *Stuart*, 3 *East*, 89. But *Bayley* J. said, that in that case the attorney who lodged the detainer knew that the defendant was privileged from arrest, on the ground of his being in attendance on the arbitrator under a rule of Court. The consequence of holding a detainer to be invalid on the ground of the irregularity of the original arrest would be, that if a defendant was arrested on a *Sunday*, for instance,

(*a*) Acc. in C. P. *Davies* v. *Chippendale*, 2 *Bos. & Pul.* 282; *Howson* v. *Walker*, 2 *Bla.* Rep. 823; vide *Quin* v. *Reynolds*, 3 *M. & S.* 111; *Loveridge* v. *Plaistow*, 2 *Hen. Bla.* 29.

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sitively sworn, that the detainer was without any collusion with the plaintiff in the first action. They admitted, that if there had been any fraud or collusion between the present and the original plaintiff, the case might be different; but here it was sworn that the plaintiff and his attorney knew nothing of the defendant being in custody, until they saw an account of the former motion in the newspapers. The case of *Howson* v. *Walker*, (a) was a decisive authority upon this

at the beginning of the long vacation, when all the Judges were out of town, he would be protected from the claims of his creditors during the whole vacation. *Le Blanc* J. In *Spence* v. *Stuart*, the plaintiff was cognizant of the irregularity of the original arrest. Rule absolute to discharge defendant out of custody on the first arrest, but without costs; rule discharged as to the two subsequent detainers.

Third persons, who find a defendant in custody, have a right to treat him as lawfully in the custody in which he is found, for otherwise they would have no means of proceeding. Where an attorney of the C.P. is in the actual custody of the marshal, he may be sued in the K.B. as a prisoner by third persons. *Tidd*, 6th ed. 75. Warrants of attorney given to a third person, at whose suit the defendant is not in custody, are not within the rule of Court, requiring an attorney to be present on behalf of the prisoner. *Churchy* v. *Rope*, 5 *Mod.* 114; *Smith* v. *Burlton*, 1 *East*, 241. It is now the practice in both Courts not to discharge the defendant out of custody in a second action on the ground of a defect in the original arrest, unless there has been some collusion, on account of the inconvenience which would ensue if the plaintiff were obliged to enquire into the legality of the proceedings under which the defendant was arrested. *Davies* v. *Chippendale*, 2 *Bos.* & *Pul.* 282. And the circumstance of the same officer being employed on both arrests is not evidence of privity and collusion. *Howson* v. *Walker*, 2 *Bla.* Rep. 823. So a creditor may lawfully enter a detainer against his debtor, who is in fact resident within the walls of the King's Bench, or Fleet Prison, although he be not there by compulsion. *Quin* v. *Reynolds*, 3 *M.* & *S.* 144; *Wilkinson* v. *Jacques*, 3 T. R. 392. In that case *Buller* J. said, this was a detainer by another creditor who found the defendant in the Fleet, to whom it was indifferent on what account or by what means he was there. If he were in fact within the walls of the prison at the time, that is sufficient, for then he could not be arrested in the ordinary manner, but could only be detained. 3 T. R. 392; 1 T. R. 592; *Tidd*, 6th ed. 356. It is however true, that if a defendant be wrongfully taken without process, or after it is returnable, &c. he cannot be lawfully detained in custody under subsequent process at the suit of the same plaintiff, although regularly issued. *Barlow* v. *Hall*, 2 *Anstr.* 461; *Loveridge* v. *Plaistow*, 2 *Hen. Bla.* 29; *Birch* v. *Rodger*, 1 New Rep. 135; *Tidd*, 6th ed. 223.

(a) 2 Sir *W. Bla.* 823.

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question; for there it was held, that a defendant illegally in custody at the suit of one plaintiff, is not privileged from arrest at the suit of another, unless there be some collusion.

Curwood, contrà, contended, that the first arrest was illegal, and that the plaintiff in this action had no right to detain the defendant in custody upon a fresh suit, pending the discussion as to the first arrest; and he referred to *Spence* v. *Stuart*, (*a*) where an attorney who had been arrested while attending to be examined before an arbitrator, to whom a cause had been referred under a rule of Court, was discharged in an action at the suit of a creditor, by whom he had been afterwards detained. He referred also to *Molling* v. *Buckholtze*. (*b*)

ABBOTT Ch. J. I am of opinion that this detainer is perfectly legal. The difference between the case cited of *Spence* v. *Stuart*, and the present, is this—there the first arrest was void, and the detainer was also irregular, because the parties were privy to the circumstances under which the arrest was made; but here, the plaintiff by whom the detainer was lodged had no privity with the plaintiff in the original action. In the present case, the first arrest was founded on a defective and insufficient affidavit to hold to bail, and for that reason the arrest was set aside. That makes the whole difference; for it may be considered that the plaintiff in that action had not got the defendant in custody. The plaintiff in this case, finding that the defendant had been arrested, lodges a detainer against him, without knowing under what circumstances the arrest took place. Under these circumstances, I think the defendant is not entitled to his discharge. If we were to decide otherwise, a person under an illegal

(*a*) 3 *East*. 89. (*b*) 3 *M. & S.* 153.

arrest at the suit of one person would be completely protected during such imprisonment from all other process, which would be productive of great inconvenience and suspension of justice.

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The rest of the Court concurred.

Rule discharged.

THE KING *against* MOSELEY WOOLFE. (*a*)

Wednesday, June 30th.

The sheriff is bound ex officio to levy the fine imposed upon a defendant's conviction for a misdemeanour; at all events the writ of levari facias is regular if it has been adopted on the part of the Crown. (*b*)

F. *POLLOCK* on a former day obtained a rule to shew cause why the writs of *levari facias*, issued for the purpose of levying the fine of 10,000*l.* which this defendant was adjudged to pay to the King as part of his sentence, upon a conviction for a conspiracy, (*a*) should not be set aside, on an affidavit made by the defendant and his solicitor, stating in substance, that these writs had been moved for and obtained entirely

(*a*) Vide *ante*, 428.

(*b*) By the stat. 3 *Geo.* 1. *c.* 15. *s.* 18. it is enacted, that, instead of the oath usually administered to sheriffs at the entering upon their offices, the following oath shall be taken by each of them respectively, excepting the sheriffs of the several counties in *Wales*, and of the county palatine of *Chester*, viz. "I *A. B* do swear, that I will well and truly serve the King's Majesty in the office of sheriff of the county of ——, and promote his Majesty's profit in all things that belong to my office, as far as I legally can or may. I will truly preserve the King's rights, and all that belongeth to the Crown. I will not assent to decrease, lessen, or conceal the King's rights, or the rights of his franchises; and whensoever I shall have knowledge that the rights of the Crown are concealed or withdrawn, be it in lands, rents, franchises, suits, or services, or in any other matter or thing, I will do my utmost to make them be restored to the Crown again, and if I may not do it myself, I will certify and inform the King thereof, or some of his Judges. I will not respite or delay to levy the King's debts, for any gift, promise, reward, or favour, where I may raise the same without great grievance to the debtors," &c. &c. So it is laid down, that the ministerial authority, duty, or office of the sheriff, consists principally in these things, *viz.* "truly to keep the King's rights of the Crown within his county, sc. the King's lands, franchises, suits, rents, and all other things that belong to the Crown. 2. Truly to gather and bring into the Exchequer the profits and monies due to the King within his county or bailiwick, sc. the King's rents, farms, debts, issues, amerciaments, fines and forfeitures," &c. &c. *Dalton*, *c.* 5, *p.* 36. *Impey's* Office of Sheriff, 33, 1. *Ante*, 440.

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at the instance of the sheriffs of *London*, without the sanction of the Crown, or any person representing the Crown; and suggesting that the Corporation of the city of *London* intended to claim the money levied under the executions, the proceeds of which were now in the hands of the sheriffs.

The Court then granted the rule *nisi*, and directed it to be served on the sheriffs of *London*, and at the same time that notice of it should be served upon the solicitor for the Treasury, the solicitor for the Corporation of *London*, and the solicitor for the prosecution.

The Solicitor-General appeared this day in Court on behalf of the Crown, and expressed the concurrence of the Crown in the proceedings adopted for levying the fine, praying only that the sheriffs might be directed to bring into Court the money levied under the writs, in order that it might abide the operation of law.

Gurney and *Chitty* appeared for the sheriffs and the prosecutors respectively, and said on behalf of the former, that they had sued out the writs in the exercise of what they considered to be their duty, for the purpose of enforcing the sentence of the Court, and were ready to bring the money into Court when received, in order to await the directions of the law. The sheriffs laid no claim to the fine personally, and their affidavit stated that they had made application to the Solicitor-General to know his pleasure upon the subject, and that he had sanctioned their proceedings.

The Common Serjeant, on behalf of the Lord Mayor and Corporation of the city of *London*, also appeared, and said that they were willing to acquiesce in the di-

rection of the Court as to the disposal of the fine according to law, when brought in by the sheriffs.

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The COURT then called upon

F. Pollock to support his rule. He submitted, first, that the acquiescence of the Crown in the proceedings adopted by the sheriff, could not legalise the process, unless it had originally issued under the immediate authority and direction of the Attorney or Solicitor-General; and secondly, that the sheriff, of his own mere motion, had no right to sue out the process. As to the first point, he admitted, that where civil process issues by one party, it may be adopted and sanctioned by other persons interested in the subject matter; but in all criminal cases, not originally sanctioned by the Crown, the process could not be adopted or approved by the Crown, so as to legalise the proceedings. Here it was admitted that the sanction of the Crown was not obtained until after the process had issued, and consequently, upon principle, the proceedings could not be recognized by the Court as being founded in law. With respect to the second point, there appeared to be nothing in law or usage to justify the sheriffs, at their own instance, in suing out the writs. If there was any thing in the oath taken by the sheriff, by virtue of the statute, (*a*) to sanction him in suing out process to levy the Crown debt in such cases as this, it was most extraordinary that during a period of 140 years no instance of the like proceeding had occurred; and if the oath so prescribed was compulsory upon the sheriff to take such steps, it must be considered that during all that period all the sheriffs throughout the country had neglected their duty. The only instance in which this authority had been exercised by the sheriff, was in the case of

(*a*) 3 *Geo.* 1, *c.* 15. *ante*, 583, note.

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the *King* v. *Wade*, (*a*) but that was an authority which as had been before contended when this subject was under discussion, could hardly be considered as binding on the Court. It was to be plainly inferred from the affidavits before the Court, that the process in the present case had not been sued out from a sense of public duty, but from motives of personal interest on the part of the sheriffs, and therefore the Court would not be disposed to countenance a proceeding which did not appear to be authorized by law.

ABBOTT Ch. J. I am of opinion that this rule ought to be discharged. When the rule *nisi* was granted, the Court acceded to the motion, upon a suggestion that the process had issued without the authority of the Crown. That suggestion seems now to be without foundation; and had I been aware that the Crown had sanctioned the proceeding, undoubtedly I should not have been disposed to listen to the application. It is contended, that the adoption by the Crown of the proceedings of the sheriff will not legalise these proceedings. I think otherwise: because it is competent for the Crown to sanction, at any time, that which may be done by the sheriff for the purpose of recovering the debt of the Crown. But it appears to me, that the sanction of the Crown would not be necessary to warrant the issuing of this process, inasmuch as the sheriff is bound by his oath of office to take care that the debts of the Crown shall be promptly levied. This application is made on behalf of the defendant, on a suggestion that he may be liable to double process against him to recover the fine; one at the instance of the Crown, and the other at the instance of the sheriff. There can be no apprehension of that kind, because the fine can be levied but once, and the proper authority to levy it is the sheriff. But the foundation of

(*a*) *Skin.* 12. 2 *Show.* 173, S. C. *T. Jon.* 185, S. C.

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this motion completely fails, for it turns out that the Crown has sanctioned the writs that have been issued, and therefore, without entering further into the subject, I think this rule must be discharged.

BAYLEY J. I am entirely of the same opinion. The money levied by the sheriff will be brought into Court, to abide the disposition of it which the law may direct; but I cannot help thinking, that, even if the sheriff himself had a personal interest in levying the fine, he would be perfectly authorised in so doing by his oath of office. Without, however, considering whether he had or had not a personal interest, I think he has done extremely right in adopting the steps which he has taken, and I wish that before this application was made, the oath prescribed by the statute (*a*) had been sufficiently considered, as it must have satisfied any rational mind, that there was no pretence for the application.

HOLROYD J. The sheriff is the King's officer, and it is his particular duty to take care of the King's revenue, and, amongst other sources of it, the fines due to the Crown. The sheriff, in this case, was justified in suing out the process of the Court, in order to enable him to levy the fine upon the property of the person convicted.

BEST J. I do not see what interest this defendant has in resisting the process; because, whether the writs of *levari facias* have been issued directly by the Crown, or sued out by the sheriff, the judgment will be satisfied by bringing the money into Court.

Rule discharged.

The COURT, on the motion of *Gurney*, then en-

(*a*) See 3 *Geo.* 1, *c.* 14, *s.* 18, *ante*, 583, note.

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larged the time for the sheriffs making their return to the writs until the first day of next Term.

Wednesday, June 30th.

THE KING *against* W. H. COLERIDGE, Clerk, AND OTHERS.

Burial in the parish church-yard is a common law right inherent in the parishioners, but the mode of burial is of ecclesiastical cognizance; and therefore this Court refused a *mandamus* to inter the body of a parishioner in an iron coffin.

CHITTY on a former day obtained a rule, "calling upon the rector, officiating curate, church-wardens, and sexton of the parish of St. *Andrews, Holborn*, to shew cause why a writ of *mandamus* should not issue directed to them, commanding them to do every act necessary to be done in order to the burial in the Church-yard or other usual burial ground of that parish, of the corpse of *Mary Gilbert* deceased, the late wife of *John Gilbert*, a parishioner of the said parish." It appeared from the affidavits that the corpse had been refused interment on account of its being deposited in an iron coffin.

Gurney and *Campbell* now shewed cause against the rule, and submitted, first, that a *mandamus* would not lie, to command the defendants to inter the body in a particular manner; and secondly, that supposing the Court to have cognizance of such matters, it could not enforce the right of interment in the manner proposed, inasmuch as that right was incompatible with the common rights of the rest of the parishioners. As to the first point, they submitted, that supposing the common law gave the parishioners of a parish a right of burial in the parish church-yard, still the manner of interment was exclusively a matter of ecclesiastical cognizance, and over which this Court had no controul. As to the second point, this application was made upon the foundation of a supposed common law right of interment, in any manner that the friends of a deceased parishioner might demise. Admitting

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that the parishioners had a common law right of interment in the parish church-yard, it must be conceded that that right ought to be exercised according to the prescribed mode which usage and custom had sanctioned. A right of this kind could not be exercised if it interfered with the rights of the parishioners at large. The right here claimed was of that description, because it would exclude the rest of the parishioners from the enjoyment of it. It appeared from the affidavits, that the present applicant was desirous of having the remains of his wife interred in the church-yard in a manner contrary to the usage of the parish, which usage had obtained for a great number of years. It was sworn, that the inhabitants of St. *Andrews* parish amounted to 30,000, and that the deaths and burials were 700 annually. Upon such a statement of facts it was obvious, that if the practice became general of interring the deceased in iron coffins, the church-yard would in a very short time be completely filled, so as to render it impossible to inter the bodies of the inhabitants dying in the parish. It was obvious then, that this mode of interment could not be claimed as a common law right, because in the enjoyment of it, it would be injurious to the rights of the rest of the parishioners. The short answer therefore to this application was, that no man could exercise a right which must invade the rights of others. If the principle of the right now claimed were sanctioned by the Court, it might be carried to an inordinate extent, utterly inconsistent with the interests of the community at large, because the party might insist upon having the body interred in an iron coffin 30 feet by 20. There was no limit to the right, if it existed at all, and it might be carried to any extent that the whimsical imagination of any person might suggest. The Court would recollect, that the contest here was not as to the common law right of interment simply in the church-yard, but whether the party had the right of interment in a new,

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extraordinary, and inconvenient manner, pregnant with injury to the rights of others, and even dangerous to public health, it being sworn that the patent coffins were so constructed as not to confine the unhealthy effluvia emitted from decaying animal matter. As a question of health, independently of other considerations equally important to the public, the Court would not be disposed to give effect to this application. It was to be observed, that this motion was not made on behalf of a person anxious to pay due respect to the remains of one dear to him while alive, with those obsequies that were suitable to the solemnity of the occasion; but it was made by a trading speculator desirous of bringing into general use, for his own private advantage, an invention of which he claimed to be the author. The affidavits disclosed facts demonstrating that this was the object, and therefore whatever colour of right there might be to bury the deceased in this manner, the Court would not be much disposed to sanction a proceeding influenced by such motives, more especially, as the defendants had expressed their willingness to bury the body in the usual and accustomed manner, if brought to them for that purpose. In all events this was a question solely of ecclesiastical cognizance, and was analogous to the cases of the *King* v. the *Bishop* of *London*, (*a*) the *King* v. the *Churchwardens* of *St. Peters, Thetford*, (*b*) and the *King* v. the *Archbishop* of *Canterbury*. (*c*)

Scarlett and *Chitty* in support of the rule. It must be admitted as a clear principle of common law, founded upon ancient usage, and recognized by various acts of parliament, that the inhabitants of a parish have a right to be buried in the church-yard; and the question in this case is, whether the parishioner is to be limited as to the particular mode and manner of

(*a*) 1 *Wils.* 11. (*b*) 5 T. R. 364. (*c*) 8 *East*, 212.

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exercising this right. If it be admitted that the parishioners have a common law right of burial, it is impossible to distinguish the manner of burial from the right. The right being conceded, the manner must follow of course, because so far as concerns this question it signifies nothing whether the party chooses to have the body buried naked, or in an iron coffin. The claim made in this case seems to be resisted on the ground of the established usage in the parish of burying in a particular manner. No usage of this kind could controul the common law right of the subject, to be buried in whatever manner he pleases, whether in a leaden, iron, or stone coffin. The question must be brought to this—whether the party having a common law right of burial, has a right to be buried in a specific manner, for the purpose of avoiding those consequences which but too frequently attend the interment of a body in the ordinary manner. It is well known that a practice has prevailed, of *weeding* the church-yards of the metropolis, through the instrumentality of persons called resurrection men, of subjects for the skill of the anatomist. The question therefore is, whether the subjects of this country have a right to protect the remains of their friends and relations from the unhallowed hands of such persons, by such means as it may seem fit to them to devise. The question here is, not whether a particular person shall succeed in his patent, but whether a husband has the right to insist upon his wife being buried in an iron coffin, for the purpose of protecting her remains from the dissecting knife of the anatomist. If it be admitted that this is a legitimate object, there is no other mode of accomplishing it, than by applying to this Court for a *mandamus*. This is the only specific remedy; and there are a variety of authorities to shew that this Court will interpose to enforce a right, not otherwise protected or enforced specifically by the law of the

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land. The general principles and grounds upon which a writ of *mandamus* is to be issued, were fully established in the case of the *King* v. *Barker* and *others*, (a) in which a *mandamus* to trustees of a meeting-house, to admit a dissenting teacher, was granted. Lord *Mansfield* there expressed himself in these words. "A *mandamus* is a prerogative writ, to the aid of which the subject is entitled. The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used on all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. And within the last century it has been liberally interposed for the benefit of the subject. The value of the matter, or the degree of its importance, to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied. Writs of *mandamus* have been granted, to admit lecturers, clerks, sextons, and scavengers, &c.; to restore an alderman to precedency, an attorney to practice in an inferior Court." Lord *Mansfield* then observes, "The question is of a nature to inflame men's passions. Should the Court deny this remedy, the congregation may be tempted to acts of violence, in breach of public peace, to the reproach of government, and the scandal of religion." Lord *Ellenborough*, in the case of the *King* v. the *Archbishop* of *Canterbury*, (b) says, "two things must concur to authorise the issuing of a *mandamus*,—a legal right, and the want of a specific remedy:" Both these concur in the present case. There are cases resembling the present in principle; in the case of *Amherst*, (c) in 23 *Car.* 2, the Court said, "This Court will interpose when any officer will not do justice, or will go out of his author-

(a) 3 *Burr.* 1265. (b) 8 *East*, 219. (c) 1 *Ventris*, 188.

ity; for there is the same reason to command to do justice, as to prohibit injustice. The Bishop of *Exeter*, in consequence of disputes with a town in *Cornwall*, denied them *chrism*, (a) and a *mandamus* was issued from this Court to command him to give it them. The proceedings on the *mandamus* were produced in Court by Mr. *Nay*, and Sir *William Jones* said, "This Court commands a Bishop to grant administration, though it be in a matter this Court has no cognizance of, as was done in Sir *G. Sandy's* case, after great debate." This case of the Bishop of *Exeter* is more fully stated in the case of the parish of *Kent*, (b) in which it appears that the parish was within the diocese of the Bishop of *Exeter*, claimed of the foundation of King *Arthur*, and was therefore exempt from the visitation of the Bishop; and there being great contentions between the Bishop and the parson, who would not permit the Bishop to visit the parish, the Bishop refused the holy oil to baptize the parishioners' children, and the *mandamus* was issued, although the Archbishop might have been appealed to. So in the case of the *King* v. the *Dean* and *Chapter* of *Trinity Chapel, Dublin*, (c) it was laid down that a *mandamus* may be directed to a Bishop to induct a man into his prebendary, and to give oil to a priest in baptism; and the Court there said that the right of any person was not to be determined upon a *mandamus*. It gives a remedy where there is a seeming probability for it. So in a case in 2 *Siderfin*. 114. where a man appointed his executors in *Virginia*, and the next of kin were refused a probate, a *mandamus* was issued, and the Court said, that this Court has jurisdiction over all other Courts, as well in cases of misfeasance as of nonfeas-

(a) *Chrism* is a confection of oil and balsam, consecrated by the bishop, and used in the Popish ceremonies of baptism, confirmation, and sometimes ordination. *Jacob's* Dict. Chrism.

(b) *Palmer*, 51.

(c) 8 *Mod.* 28.

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ance. The right to burial, as has been already said, is a common law right, recognized and enforced by acts of parliament. In *Degge's* Parson's Law, part 1, c. 12, and *Burn's* Ecclesiastical Law, title Burial, 237. it is thus laid down. "By the custom of *England*, any person may be buried in the church-yard of the parish where he dies, without paying any thing for breaking the soil, though by special custom, triable only in the Temporal Courts, a fee may be due. So in the *Complete Incumbent*. (*a*) The church-yard is the common burial place of all the parishioners. (*b*) So in *Com.* Dig. Cemetery, B. Burial is the usual character of a parochial church, and therefore every person may have burial in the church-yard where he dies, by the general custom of *England*. The case of the Dean and Chapter of *Exeter* (*c*) is to the same effect. There *Hooper* Serjt. shewed cause against a rule for a prohibition to the Spiritual Court, to stay a suit there, for a customary fee due to to the Dean and Chapter of *Exeter*, for burying in the cathedral church; *sed non allocatur*, for no fee is due for burial of common right. If there be any particular custom to be tried, it must be at common law. Burials, at common law, ought to be in the church-yard, and without fee. (*d*) Several acts of parliament recognize this right and obligation. By 3 *Jac.* 1. *c.* 5. *s.* 5. a penalty of 20*l.* is given if a Papist be buried out of his proper church-yard. The 30 *Car.* 2. *c.* 3. as to burying in woollen, requires the executor or person interfering, to make affidavit in the proper parish, as to the mode of interment in woollen. The 7th sect. subjects the parson to a penalty for not keeping a due register of the burials. In this respect the canon and civil law correspond. The 68th canon directs, "That no minister shall refuse or delay to bury any corpse that is brought to the church or church-yard (conve-

(*a*) 381. Ed. 1795.
(*b*) *Bac.* Abr. title Churchwarden, B.
(*c*) 1 *Salk.* 334.
(*d*) *Bourdeaux* v. Dr. *Lancaster*, 12 *Mod.* 171, 2.

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nient warning being given him thereof before) in such manner and form as is prescribed in the Book of Common Prayer; and if he shall refuse so to do, except the party deceased were denounced excommunicated, he shall be suspended by the bishop of the diocese from his ministry, by the space of three months." But this, it will be observed, affords no specific remedy to compel the burial and performance of the funeral ceremony. *Mandamus* lies to compel the repair of a bridge, though the common law may give a remedy by indictment for the non-repair. (*a*) It has been supposed that a dead body may be detained for debt, and burial prevented. This was the case with the body of *Dryden* the poet. But Lord *Ellenborough*, in *Jones* v. *Ashburnham*, (*b*) refuted that idea, on the ground that it was revolting to humanity to deprive a body of funereal rites and Christian burial. In 25 *Geo.* 3. *Young and others* were indicted for detaining a body from burial. In *Hil.* 7 *Geo.* 1. a rule was obtained, calling on Mr. *Taylor*, rector of *Daventry* in *Northamptonshire*, to shew cause why an information should not be filed against him, for refusing to bury the body of a parishioner. (*c*) Burial cannot be denied on account of the fee not having been paid. In the *King* v. the *Lord* of the *Manor* of *Hendon*, (*d*) an application was made for a *mandamus* to the lord of the manor to admit a copyholder, and the application was resisted on the ground that certain fines ought to be paid by the tenant, before admission, and that otherwise the lord would be cheated of his fines; but the Court said, that the reason assigned was not sufficient to warrant them in refusing the application. That they had frequently declared they would give no opinion respecting the lord's fine on an application by a tenant for a *mandamus*, to be admit-

(*a*) The *King* v. the *Commissioners* of *Dean Inclosure*, 2 *M.* & *S.* 83 and 85.

(*b*) 1 *East.* 465. (*c*) *Willes*, 538, in notes. (*d*) 2 T. R. 484.

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ted, because the lord has no right to the fine at all till admittance. In *Littlewood* v. *Williams*, (a) *Gibbs* Ch. J. said, "At the trial of this cause, the plaintiff's claim was put on a strict right in the churchwardens to their fees. The supposed right is to a fee on burial. At common law the churchwardens have no such right whatsoever; it may exist by custom, but the custom must be immemorial and invariable." These are authorities to shew that this Court will interpose by *mandamus*, to enforce the common law right of burial in the parish church-yard; and from these it must be inferred that the Court cannot make any distinction as to the manner in which the right is to be exercised. In the present case, it is obvious from the affidavits, that the parish of St. *Andrews* is not so much disposed to resist the exercise of this right, as a matter of mere right, as to make it the means of exacting larger burial fees than have been usually paid; because it is sworn that the defendants offered to inter the body, upon payment of the sum of 10*l*. Under such circumstances, the Court would not be disposed to further their views of pecuniary advantage, but would rather give effect to the present application, which is founded upon a common law right, and which is conformable to the interests of humanity and public decency.

ABBOTT Ch. J. It is very much to be regretted that circumstances should require the public discussion of a matter of this nature; and I think I may say that it would be to be regretted that any other mode of burial of the bodies of the deceased than has been usual in the parishes of this country, should become general. The question now only is, whether this Court can interpose in this particular case, by granting a *mandamus*; and I am of opinion that it cannot. It may be admitted, for the purpose of the

(a) 6 *Taunt*. 281.

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present question, that sepulture in a parish church-yard is a common law right; but I think that the mode of burial is a subject of ecclesiastical cognizance, and ecclesiastical cognizance only. If a clergyman should obstinately refuse to bury the body of a parishioner brought to him for interment, I am by no means prepared to say that this Court would not grant a *mandamus*, commanding him to perform the obsequies of the dead. But in the cases cited, in which this Court has interfered by *mandamus*, the Court was only acting in furtherance and in aid of the ecclesiastical jurisdiction. In some of the cases cited, application was made to this Court to attain the objects in view with more celerity than they could be obtained by the process of the ecclesiastical jurisdiction, the proceedings of which were more slow in their nature than the proceedings of this Court, by the writ of *mandamus*, to compel the performance of that which was required to be done. This Court would interpose to order that to be done which might lawfully be done; but it would not require parties to do that, which would be indecorous in its nature, or might become the subject of indictment as a public nuisance. In the case before the Court, the object is not to inter the body of the deceased in the usual and ordinary mode of burial, but the contest between the parties is, whether the officers of the parish shall bury the body in an unusual and extraordinary manner. Without pronouncing what the Ecclesiastical Court may do, I am of opinion that that is a question proper for the decision of the Ecclesiastical Court, and not of this Court. I need not observe, that in matters purely of ecclesiastical cognizance, this Court does not interfere. In the common and familiar instance of the repairs of a parish, it is well known that this Court will not interpose by *mandamus* to compel the repairs of a parish church. Considering therefore the mode and manner

of burial as a matter solely of ecclesiastical cognizance, I think we ought not to sanction this application.

BAYLEY J. I agree in the opinion which my Lord has expressed, and I think we ought not to interpose the authority of this Court for the purpose in view, inasmuch as the object of the application is to bury in a specific manner, and not to enforce the common law right of interment. It is not for this Court to say there shall be a particular mode of burial, because that is a matter purely and exclusively for the consideration of the Ecclesiastical Court.

HOLROYD J. I am of the same opinion. The matter in dispute is merely as to the mode of burial, and that I think is purely of ecclesiastical cognizance, as has been held by my Lord *Coke* in his Third Institute, 203, where he says, "It is to be observed, that in every sepulcher that hath a monument, two things are to be considered, *viz.* the monument and the sepulture or burial of the dead. The burial of the cadaver (that is, *caro data vermibus,*) is *nullius in bonis,* and belongs to ecclesiastical cognizance; but as to the monument, action is given (as hath been said) at the common law for defacing thereof." The mode of burial is matter entirely of ecclesiastical cognizance. So also as to what prayers shall be read at the funeral, or what ceremonies observed, they must be solely of ecclesiastical and not of temporal cognizance. It appears to me therefore that we cannot grant a *mandamus* in this case.

BEST J. This is a question proper for the consideration of the Ecclesiastical Court, and that is a sufficient reason why this *mandamus* should not be granted. But putting the Ecclesiastical Court entirely out of the ques-

tion, I should not be disposed to grant a *mandamus* in such a case as this. It is said that the inhabitants of a parish have a common law right to be buried in the parish church-yard. The Court undoubtedly has a right to exercise a discretion as to the propriety of granting or refusing a *mandamus* to enforce that common law right; but it appears to me, that if we were to grant a *mandamus* in the present case, we should be defeating that common law right: for if what is said here be law, that a man has a right to bury his relative in an iron or a stone coffin, the church-yard would soon be filled, and the Court would have no means of enforcing the right on behalf of the rest of the parishioners. The Court must be left to a certain degree to exercise a sound discretion in cases of this nature; and one cannot but see from these affidavits, that this is not a solitary case in which a man is extremely anxious to have a coffin made of that sort of material which may preserve the remains of a dear connection from any improper intrusion or disturbance; but it is an application made in the name of this person in order to carry into effect and bring into general use a species of manufacture, for which another person has obtained a patent. I think that is not such a case in which this Court would be disposed to exercise its authority by granting a *mandamus*, merely to forward the interests of a patentee. It appears to me, that if we were thus to interpose we should improperly deprive the vestry of the parish of that discretion which they have a right to exercise in matters of this nature; and I think that instead of doing any good by issuing this process, we should not only be doing an injury to this parish, but to the public at large. It has been decided by this Court, that they will enforce the burial of a parishioner; but as to the manner of the burial, they have no right to interfere.

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Gurney then prayed that the rule might be discharged with costs.

ABBOTT, Ch. J. I intimated my opinion upon this question pretty clearly when the motion was first made. It appeared to me then, that it would be found to be purely matter of ecclesiastical cognizance. The parties were very anxious to have the point further discussed, and I think they must be at the expence of the discussion.

Rule discharged, with costs.

END OF TRINITY TERM.

CASES

PRINCIPALLY

ON

PRACTICE AND PLEADING,

AND RELATING TO THE

OFFICE OF MAGISTRATES,

DETERMINED

IN

The Court of King's Bench.

IN

Michaelmas Term,

In the Sixtieth year of the Reign of GEORGE III.

1819.

November.

JELL *against* DOUGLASS.

Notice of justification of *three* persons as bail, held regular, and the bail justified. (*a*)

NOTICE was given of the justification of three persons as bail for the defendant in this action, who was held to bail for the sum of 1536*l.*, and the bail now appearing to justify,

(*a*) Acc. in Excheq. *De Tastel* v. *Kroyer*, *Wightwick's* Rep. 110, in which *M'Donald* Ch. B. said, I do not know that there is any line drawn with respect to the number of bail; it must depend upon the particular circumstances of each case; and see *Lofft*, 26 and 252. But in C. P. in the case of *Allen* v. *Keyt*, 2 *Bla.* Rep. 1122, it is said, that a notice given to justify three bail, was held irregular. The defendant, it was said, might as well give notice of three score, and the plaintiff to inquire after them all

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Chitty opposed the justification on the ground, that *three* bail, if objected to, could not justify, as it incurred the trouble of inquiring after their sufficiency, and multiplied the number of actions in case it should become necessary to proceed against the bail; and he referred to the case in C. P. of *Allen* v. *Keyt*, 2 *Bla. Rep.* 1122, and in K. B. *Lofft's* Rep. 26; but

The COURT held, that the three bail might justify; the first in 3000*l.*, the second in 1000*l.*, and the other in 1500*l.*, and that convenience required that this practice should prevail. For it might be difficult for the defendant, who was arrested for a large sum, to find two persons who were willing to become responsible to the required amount, and it appearing that the bail who proposed to justify were qualified in respect of their property,

Per Curiam, Bail allowed.

over London. And in *Lofft's* Rep. 252, *Tidd's Practice*, 264, it is said, that notice that *A*, *B*, and *C*, *or two* of them, will justify, is irregular in K. B. but that it is otherwise in C. P.; but the case there referred to does not seem to support that distinction. One person alone cannot become bail for the defendant. *Steward* v. *Bishop*, *Barnes*, 60.

The KING, *on the prosecution of* HUNT, *against* —— *and* —— JUSTICES *of Lancashire.*

Monday, Nov. 8th.

The motion for a criminal information must be made by the law officers of the Crown, or a barrister, and not by a private individual. (*a*)

THIS application was made by the prosecutor in person, for a rule to shew cause why a criminal information should not be filed against certain magistrates, acting for the division of *Manchester* in the county of *Lancaster*, for alleged misconduct in dispersing a public meeting held within their jurisdiction, on the 16th of *August* last.

(*a*) See the case of the King on the prosecution of *Mills* v. *Brin*, *ante*, 352.

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THE KING *against* CERTAIN MAGISTRATES OF THE COUNTY OF LANCASTER.

The COURT, upon understanding the nature of the motion, immediately interposed, and said that it was not competent for a private individual to apply for a criminal information. Such motion could only be made by the law officers of the crown, or by a barrister, who was in the nature of a public officer. They laid it down as a general rule, applicable to all proceedings in the name of the King, that no private individual could be heard as an advocate in a court of justice. With respect to a case which had been cited, of the *King* on the prosecution of *Charles Pitt* against *Huskison* and others, in which the late Lord *Ellenborough* Ch. J. had allowed the prosecutor to address the jury in stating the case for the prosecution, they stated that that decision was not sufficient to sustain the present application; because that noble and learned judge by whom it was decided afterwards expressed himself to be in error in having permitted *Charles Pitt* to address the jury, thereby sanctioning the principle upon which the present applicant could not be heard.

The Rule was accordingly refused.

TEESDALE *against* CLEMENT.

Monday, Nov. 8th.

Declaration for libel, stating that plaintiff, a constable, had apprehended persons stealing a dead body, and had carried the body to Surgeon's Hall, and that Defendant published the libel of and concerning plaintiff's said conduct; second count, that defendant

THIS was an action against the proprietor of a newspaper called the *Observer*, for a libel, imputing to the plaintiff, a constable of the parish of *St. Pancras* in the county of *Middlesex*, improper conduct respecting the disposal of a dead body which had been taken from the possession of certain persons apprehended by the plaintiff, and brought before a magistrate on a charge of unlawfully stealing the same, for the purpose of selling it for surgical dissection. At the trial before *Abbott* Ch. J. at the *Middlesex* Sittings after last Term, the Plaintiff was nonsuited on the ground that

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the introductory matter set forth in the first count of the declaration, was not supported by the evidence.

The first count of the declaration, after the usual inducement of the plaintiff's good character, proceeded to state, that the plaintiff being one of the constables of the parish of *St. Pancras*, had in the execution of his office, with the assistance of one *J. S.* taken into custody certain persons (named) who had unlawfully in their possession a dead human body; and had brought the same persons to a certain public police office, for the purpose of being examined before a justice of the peace; and that the same persons having been examined before *T. L.* Esq. a justice of the peace, the said *T. L.* ordered and directed the said plaintiff, so being such constable, to take and carry the said dead human body to a certain public building called or known by the name of *Surgeon's Hall*, and there to deliver and leave the same; and the said plaintiff, &c. had in pursuance of, and obedience to such order and direction as aforesaid, accordingly taken and conveyed the said dead body to, and left and delivered the same at *Surgeon's Hall* aforesaid. The declaration then went on to allege, that the defendant, contriving, &c. falsely, wickedly, and maliciously, did publish, and cause and procure to be published in a certain public newspaper, called or known by the name of the *Observer*, of and concerning the said plaintiff, and of and concerning his conduct as such constable aforesaid, in the matter aforesaid, a certain false, &c. libel, containing therein the false, &c. matter following of and concerning the said plaintiff and his conduct as a constable aforesaid, (then stating the libel). Second count for publishing a certain other libel, of and concerning the said plaintiff, "*and of and concerning his conduct respecting the said dead body,*" containing therein amongst

published a certain other libel, of and concerning the conduct of the plaintiff, respecting *the said dead body*; Held necessary in support of both counts to prove, that the plaintiff had carried the body to Surgeon's Hall.

other things, the false, scandalous, and defamatory matter following "of and concerning the said plaintiff, *and of and concerning his conduct* respecting the said dead body," that is to say, &c. The libellous matter set forth in the declaration, charged the plaintiff with having grossly misconducted himself in carrying the body about to different places for the purpose of being paid a price for it; but it did not state that he had taken the body to *Surgeon's Hall*, and on examining the witnesses, it appeared that the body never was in fact carried to that place. An objection was therefore taken at the trial, on the ground that the plaintiff had failed in proving the introductory matter of the declaration, because in the first count it was averred, that the plaintiff had carried the dead body to *Surgeon's Hall*, and therefore he was bound to prove that fact; and the second count was connected with the first, the libel being stated to have been published of and concerning the plaintiff's conduct respecting "the *said* dead body", which necessarily meant the dead body alluded to in the first count, and included all the descriptive matter with reference to the carrying of the body to *Surgeon's Hall*. *Abbott* Ch. J. was of opinion that the plaintiff was in support of both counts bound to prove the introductory allegation in the first count, that the dead body was carried to *Surgeon's Hall*; and having failed to prove that fact, he must be nonsuited.

Gurney (with whom was *Chitty*) now moved for a rule to shew cause why the nonsuit should not be set aside and a new trial granted; contending that the second count was sufficiently unconnected with the first to entitle the plaintiff to recover upon the evidence adduced, because that count did not necessarily include the whole introductory matter in the first, as to carrying the body to *Surgeon's Hall*. The second count

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merely meant to allude to the dead body before spoken of, without comprehending the descriptive matter with respect to the manner of disposing of the body, and therefore he contended that the nonsuit ought to be set aside.

SED PER CURIAM. The second count of the declaration upon which this objection arises, does not speak merely of the dead body, but the plaintiff's *conduct* with respect to the dead body; and part of the conduct stated in the first count was that of carrying the body to *Surgeon's Hall*. It may be true that the second count alludes to the dead body before spoken of in the first count, but the gist of the allegation is, that the libel was published of and concerning the plaintiff's *conduct* with respect to the dead body; that conduct being such as is set out in the introductory part of the first count. The dead body alluded to in the second count, means the same dead body in the first, with all the circumstances relating thereto. The mere identity of the body, without taking in all the facts, is not sufficient; because if one fact may be taken away, several may, and the consequence would be, to do away the necessity of proving any part of the introductory matter alleged. The fact which has failed in proof, is very material to the libel itself; for the libel is with respect to the plaintiff's conduct as to this dead body; and if the constable is charged with carrying this body amongst other places to *Surgeon's Hall*, it certainly is most important to prove that part of the conduct. Therefore when the second count speaks of "the said dead body," it must mean the dead body before spoken of; and unless it incorporates all the descriptive circumstances then introduced, it is difficult to say what it does not incorporate, for it is impossible to separate the one from the other, and that was the opinion expressed at the trial. In framing such a declaration as this, a much

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greater burthen is cast upon a plaintiff than is necessary. This difficulty might have easily been avoided, but as it was not, this rule must be refused.

Rule refused.

Monday, Nov. 8.

HEBDEN *against* HENTEY.

In action for penalties on stat. 5 *Ann.* c. 14, for using a gun to kill and destroy game, Held, sufficient to prove, that the defendant was beating about for game, and pointed his gun, though he did not fire at any game. (*a*)

ACTION of debt on statute 5 *Ann*, c. 14. against an unqualified person, to recover penalties for using a gun to kill and destroy game. At the trial before *Holroyd* J. at the last Assizes for the county of *Huntingdon*, it appeared in evidence that the defendant was the game-keeper of a manor, adjoining to that in which the offence was alleged to have been committed. The defendant had gone into the latter manor, with a gun and dog, and appeared to be beating about for game. The dog had snapped at a hare, and there was a count in the declaration for destroying that hare, the defendant being charged with having used the dog for that purpose. A covey of birds was put up, and the de-

(*a*) See *Rex* v. *Davis*, 6 *T. R.* 177. But some evidence must be given of the defendant's using the gun for the unlawful purpose. The *King* v. *Gardner*, *Andrews*, 55; 2 *Stra.* 1098, S. C.; 2 Sess. Cas. 385, S. C. The declaration upon this statute must state, that the defendant was unqualified, and the omission to make that averment will not be remedied by the insertion of the word 'unlawfully.' *Hebden* qui tam v. *Bluff*, before *Abbott* J. at *Hereford*.

An information on the 5 *Anne*, c. 14, for keeping a net, must negative the qualification, or it will be insufficient after verdict, although the word 'unlawfully' is inserted in the count.

Mich. Term, 1816, *Nov.* 6th. Information on statute 5 *Anne*, c. 14, for keeping a net, and a verdict was given for the plaintiff on the second count. The declaration did not negative the defendant's being qualified to kill game, but the word 'unlawfully' was introduced. *Campbell* moved in arrest of judgment, on account of the omission to negative the qualification, and referred to the statute 5 *Anne*, c. 14. *Bayley* J. asked, if the defendant was not qualified whether he could have kept the net lawfully. And the cases of *Spiers* v. *Parker*, 1 *T. R.* 141; *Rex* v. *Stone*, 1 *East*, 639; 2 *Bla.* Com. 395; 1 *Saund.* Rep. 228, were referred to. Lord *Ellenborough* Ch. J. asked if there was any case which shewed whether the general averment, 'unlawfully,' was sufficient to negative the qualification. The Court granted a rule *nisi*, and cause being shown at *Sergeant's Inn* on 22d *January*, 1817, it was held, that the insertion of the word 'unlawfully' only was not sufficient, and that the plaintiff must negative the qualification. Rule absolute.

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fendant pointed his gun at them, but he did not fire. Under these circumstances the jury found for the plaintiff.

Blossett Serjeant, now moved for a rule *nisi* to set aside the verdict and enter a nonsuit; contending that the evidence in the cause did not satisfy the averment in the declaration, that the defendant "had used a gun to kill and destroy game," because for any thing that appeared, the circumstance of the defendant having pointed his gun, was no more than if he had pointed a stick at the game.

ABBOTT Ch. J.—As this question was left to the jury, I do not see how we can disturb the verdict; and certainly there was evidence sufficient to go to them, upon the question whether the defendant had used the gun to kill and destroy game. The generality of that allegation must be coupled with the circumstances proved, and no doubt the learned Judge left the case entirely for the consideration of the jury; and as I think he was right in so doing, I am of opinion that we ought to leave the verdict where it is.

BAYLEY J.—I am of the same opinion. There was evidence sufficient to go to the jury, whether in fact the defendant was not beating about for game for the purpose of driving it into his own manor, and thereby having it within his reach. There are cases which have decided, that it is not necessary to prove that the man actually shot the game, but if he is beating about for game, so as to shew an intention on his part to shoot it if he has the opportunity, that is a sufficient using of the gun to support an action upon the statute of *Ann.* In the case of *King* v. *King*. (*a*) PARKER Ch. J. held,

(*a*) 1 Sess. Cas. 93; and see the *King* v. *Gardiner*, *Andrews*, 255, S.C.; 2 *Stra.* 1098; 2 Sess. Cas. 385.

that walking about with intent to kill game, is evidence of using the instrument for that purpose. In this case there was evidence sufficient to shew that the defendant was beating about in the field where he was seen, and using his gun for that purpose.

HOLROYD J. and BEST J. were of the same opinion.

Rule refused.

CAMPBELL *against* SEWELL.

Thursday, Nov. 11th.

After defendant had been discharged under an Insolvent Debtors' Act, he agreed to pay a preexisting debt for goods sold, part in cash and part by bills of exchange. This agreement not having been performed. Held, that plaintiff could not declare in *indeb-assumpsit* for goods sold, at least before the expiration of the time at which the bills would have become due, but should have declared specially. (*a*) *Semble*, after a debtor has been discharged by the Insolvent Debtors' Court, the plaintiff cannot declare upon fresh promises for the same debt, without the leave of that Court.

ASSUMPSIT for goods sold and delivered. Pleas :—First, non-assumpsit; second, the statute of limitations; and third, discharge under an Insol-

(*a*) The promise, in order to be binding, must be express. *Muchlow* v. *St. George*, 4 *Taunt.* 613; *Fleming* v. *Hayne*, 1 *Stark*, 370; 5 *Esp.* Rep. 198, and if the promise be conditional, as to pay when the debtor is able, &c. the happening of the contingency, on which the performance of the promise depends, must be stated, *Penn* v. *Bennett*, 4 *Campb.* 205; *Besford* v. *Saunders*, 2 *Hen. Bla.* 116; *Thompson* v. *Osborne*, 2 *Stark.* 98; otherwise the plaintiff may declare for the original debt, *Williams* v. *Dyde*, *Peake's* Rep. 68; *Russell* v. *Hardman*, *id.* 69; but independently of the peculiar situation of an insolvent debtor, it seems, that in the form in which the new promise was made in the present case, the creditor could not declare generally for goods sold before the time for which the bills were to run was expired. In the case of *Mussen* v. *Price*, 4 *East's* Rep. 147, where goods were sold upon a contract, that the vendor should pay for them in three months by a bill at two months, it was held, that the contract was for a credit at five months, and therefore that an action for goods sold and delivered was not maintainable at the end of the three months; but that the remedy was by a special action on the case for the breach of contract in not giving the bill; and see *Hoskyns* v. *Duperoy*, 9 *East*, 498, 501. But in *Nickson* v. *Jessom*, 2 *Stark.* 227, where a person sold goods at three months' credit, and agreed to take the vendee's bill of exchange at three month's date at the end of the first three months if he wished for further time, it was held, that as the vendee had neglected to give the bill at the end of the first three months, the vendor might bring his action immediately for goods sold. If it be a condition of giving further time that a bill of exchange should be given, and the purchaser neglect to perform the condition,

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CAMPBELL *against* SEWELL.

vent Debtors' Act. Issue joined on all the pleas. At the trial before *Abbott* Ch. J. at the *London* Sittings, after last Term, the case appeared to be this :—The defendant had been indebted to the plaintiff in the sum of 60*l.* for goods sold and delivered, and having taken the benefit of an Insolvent Debtors' Act, by which his personal liability for this debt was discharged, he made a subsequent promise to pay the money by paying 20*l.* down in cash and the remainder by two bills of exchange at different dates then specified. This agreement not having been performed, the present action was brought before the expiration of the time at which the bills, if given, would have become due; and the declaration was framed in the common form of *indebitatus assumpsit*, for goods sold and delivered.

Abbott Ch. J. ruled under these circumstances, that the plaintiff should have declared specially, and therefore directed a nonsuit, with liberty to move to enter a verdict for the plaintiff.

Gurney now moved accordingly for a rule to shew cause, and contended that the declaration in the present form was sufficient to maintain the action. *Sed,*

Per Curiam. This appears to have been a special promise to pay in a particular manner, and the promise should have been declared upon specially. It has been

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he may be sued immediately. 4 *East*, 152. And in the ordinary case of a sale of goods to be paid for by bill, if the drawee refuse to accept the bill, an action is maintainable for the price, as for goods sold and delivered, *Hichling* v. *Hardey*, 7 *Taunt.* 312; 1 *Moore*, 61; though the purchaser desire that the bill may be presented again, and the vendor is not bound to present it again, nor to return it. *Id. ibid.* So when a valuation had been made of certain fixtures at the sum of 17*l.*, and after payment had been delayed, it was agreed that the vendee should accept a bill at three months for the price of them, but afterwards when the bill was presented, he refused to accept it; it was held, that he might be sued for the price originally payable. *Lee* v. *Risdon*, 6 *Taunt.* 188; 2 *Marsh.* Rep. 495, S. C.

held, that in an action for goods sold and delivered, which are to be paid for, part in money and part in other goods, the plaintiff must declare upon the special contract (*a*); because he cannot separate the one from the other and go for the value of the goods generally.

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Rule refused.

The COURT, in the course of the argument upon this case, seemed to doubt whether this action could in any point of view be sustained, under the circumstances stated, without the leave of the Insolvent Debtors' Court, inasmuch as a discharge from that Court from this debt was a discharge generally as to the defendant's person. But this point was not argued, as the case was determined upon the ground already mentioned.

(*a*) *Harris* v. *Fowle*, *Mich.* T. 1787, before *Buller* J. cited 1 *Hen. Bla.* 287, &c.; *Hands* v. *Burton*, 9 *East*, 349; *Brown* v. *Fry*, *Selw.* N. P. 630.

WILLIAMS AND OTHERS *against* LEWIS.

Friday, Nov. 12th.

A defendant is not entitled to to be discharged out of custody, on the ground of his having been arrested upon a warrant, in which the names of the plaintiffs are not conformable to the writ, if the defendant be not misled by the mistake; and therefore where the arrest took place on a warrant which required defendant to answer *A. B. and two others*, Held, that he was not entitled to be discharged. (*a*)

CURWOOD moved for a rule to shew cause why the defendant should not be discharged out of custody on filing common bail, upon an affidavit, which stated that on the 12th of *August* last he was arrested by one of the officers of the Sheriff of *Middlesex*, upon a warrant which required him to answer *William Williams and two others*. On searching the office no writ was to be found to authorize the issuing

(*a*) So by the stat. 12 *Geo.* 2, *c.* 13, *s.* 4, the omission to indorse the attorney's name on the warrant to arrest does not vitiate it, provided the proper indorsement be made on the writ; because the warrant is the act of the sheriff, *Gine* v. *Allen*, *Barnes*, 414; and it seems that in a case of this nature, the Court will allow the warrant to be amended if necessary, *Cant* v. *Shaw* and others, 7 *T. R.* 299; *Davis* v. *Owen*, 1 *Bos.* & *Pul.* 342, *id.* 482; 2 *Bos.* & *Pul.* 109; *Baker* v. *Daniel*, 6 *Taunt.* 193. But the warrant cannot be filled up or altered after it has been signed and sealed. 2 *Wils.* Rep. 47, 6 *T. R.* 236; *Tidd*, 220.

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of such a warrant as that upon which the defendant was arrested. There was a writ sued out in the name of *William Williams, Robert Hughes* and *G. B. Brandon.* The warrant upon which the defendant was arrested did not contain the names of the last-mentioned two persons; and he submitted that the defendant was entitled to be discharged out of custody, there being no sufficient warrant for his detention. It was true there was a writ in the office which would authorize the defendant's person to be taken, but the Sheriff had granted a warrant to answer the suit of other and different persons, in which suit there was no authority to take him.

PER CURIAM. There may be an inaccuracy in the warrant, but if the right person is taken, does it follow that he is to be discharged? If the defendant looks at the writ he will find the suit in which he had been arrested. We cannot look to the warrant for the purpose now desired. The writ is directed to the Sheriff to arrest a certain party named; under that writ he has been arrested, and there is a mistake in the name of the plaintiffs in the Sheriff's warrant. If the defendant is unlawfully arrested he may bring an action against the Sheriff, but that is a very different consideration from calling upon us to discharge him. It is not suggested that the writ in the Sheriff's office is not a valid writ. The party is in custody, and we must consider that he is in custody under a valid writ of this Court, although the Sheriff's officer may have made a mistake in the execution of it. The defendant does not state that he has in any degree been misled by the warrant.

Rule refused.

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Friday, Nov. 12th.

The KING *against the late* SHERIFF *of* LONDON, *in a cause of* RUSTIN *against* HATFIELD.

The Court will set aside *distringas* issued against the sheriff, where the officer has given time to the defendant, and the plaintiff has acquiesced in the arrangement, and received part of the money without the privity of the sheriff. (*a*)

THIS was a rule calling on the plaintiff to shew cause why the writ of *distringas* issued against the late Sheriff of *London* in this case, should not be set aside

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Appointing a special bailiff, or giving special directions to a particular bailiff, discharges the sheriff.

(*a*) In *Porter* v. *Viner*, Esq. Sheriff. *Mich.* Term, 1815, *Nov.* 9, it was held, that appointing a special bailiff, or giving special directions to the officer with regard to the receiving the money on an execution, discharges the Sheriff, and that if the Sheriff afterwards return that he has paid over the money to the plaintiff, he is not liable to an action for a false return. This was an action against the Sheriff for falsely returning to a writ of *capias ad satisfationem* sued out by the plaintiff, in a cause of *Porter* v. *Abbots*, that he had received the execution money, and paid it over. At the trial the plaintiff was nonsuited, and *Copley* now moved to set aside the nonsuit. He observed the defendant had attempted to establish, that the sum was paid over to the plaintiff, but had failed in doing so. And the only ground of defence was, that a letter had been written by the plaintiff's agent to the bailiff, desiring him to arrest and pay the sum when recovered to him. The bailiff, in fact, had never paid over the money, or accounted for i It was contended that this letter made the officer agent for the party. The Sheriff made a return, that he had paid over the money to the plaintiff's attorney; and it was contended, 1st. that this letter was no discharge of the officer. 2nd. That it was not evidence at all on this issue; for the return admitted that the money was paid over to the Sheriff, and stated that the Sheriff had actually paid it to the plaintiff's attorney. The instructions to the bailiff were instructions to him to use his discretion. *Sed per* Lord *Ellenborough* Ch. J. This point has been repeatedly discussed on questions from one of the northern counties, where it had been usual to appoint special bailiffs, and it was held, that by such an act the Sheriff was discharged. *Dampier* J. The bailiff received the money as agent to the party. *Copley* then further insisted on the second point, that the return was a record, and estopped the officer from setting up a defence contradictory to it. *Sed per Curiam.* This is an interference of an attorney with the execution of the process which discharges the Sheriff. And *per Le Blanc* J. and that takes away the ground you would otherwise have as to the return. *Copley* then further submitted, that the Sheriff had returned that he had received the money, and if the bailiff was a special bailiff, the Sheriff was not called upon to return the writ; or if he was he should have returned, that he was discharged by the consent of the plaintiff. Lord *Ellenborough* C. J. He might have so returned. But the question is, whether on this return he is borne out by the facts. *Bayley* J. The letter mentioned that he had sent the writ to the Unde Sheriff, and then directs what the bailiff should do. In consequence of those direc-

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THE KING *against* THE LATE SHERIFF OF LONDON, IN A CAUSE OF RUSTIN *v.* HATFIELD.

with costs. It appeared upon the affidavits, that between the time for returning the writ in this cause, and the issuing of the *distringas* against the Sheriff, there had been some collusion between the officer and the defendant, to whom time was given by the former to pay the debt; and it was also sworn that the plaintiff's attorney had received 33*l.* being part of the debt, before proceedings were taken against the Sheriff; and the sin-

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tions the money remained in the hands of the bailiff. Now if the plaintiff's attorney choses to correspond with the bailiff in the way, he intercepts the responsibility of the Sheriff, and constitutes the bailiff his agent. Rule Refused.

The sheriff is discharged by the plaintiff's appointing a special bailiff and agent to manage the sale, though the sheriff returned that *he* had sold, and that *he* had paid the sum illegally deducted for the auction, &c.

So in *Pallister* v. *Pallister*, *Hil.* T. 1816, *Feb.* 10, where the plaintiff appointed a special bailiff and agent to manage the sale of goods under a *fieri facias*, it was held that the sheriff was discharged, although on being ruled to return the writ, he returned that he had sold, and that he had made deductions which it is clear a sheriff has no right to make in point of law. *Mereweather* shewed cause against a rule obtained by *Tindal*, for the constable of *Dover* Castle to go before the master, to account for the sums he had levied upon a *fieri facias*. The plaintiff's attorney inclosed the writ in a letter to the register at *Dover*, directing him to grant a warrant to the officer usually employed by some professional gentlemen at *Margate*, to whom he also wrote by the same post, directing them to see that the things were made the most of, and they in fact directed the sale, appointed the auctioneer, &c. &c. The registring officer continued in possession only a few hours, when a servant of the auctioneer took possession, &c. The register or his officers interfered no further. The auctioneer after the sale paid the poundage to the register. The plaintiff's attorney being dissatisfied with the account of the levy and disbursements given to him by the solicitors at *Margate*, ruled the sheriff to return the writ. He returned, that he levied a certain sum, and then deducted from it the landlord's rent, the church rate, highway rate, all which he stated he had paid, and the expences of the auction and possession money for fifty-two days. The illegality of this return was insisted upon in support of the rule which had been obtained for the sheriff to account; but on the facts of the case disclosed by the register's affidavit on shewing cause, *Le Blanc* J. held, that the rule must be discharged with costs.

The proper course seems to be for the sheriff in such a case, instead of making the return, to move to set aside the rule to return the writ; for it is clear the Court will not compel him to do so, when the bailiff has acted under the authority, or by the direction of the plaintiff. *De Moranda* v. *Dumain* 4 *T. R.* 119; *Beckford* v. *Welby*, 2 *Esp.* Rep. 591; *Hamilton* v. *Dalziel*, 2 *Bla.* Rep. 952; but though a special bailiff is appointed to make an arrest, the sheriff is responsible for the custody of the defendant after the arrest is made and the writ returned. *Taylor* v. *Richardson*, 8 *T. R.* 505; *Tidd*, 219, 220, 296.

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gle question was, whether the Sheriff could be identified with and liable for the officer but the fact being negatived by the affidavits,

The COURT said that they would not make the Sheriff responsible upon any pretence where there had been any private collusion or arrangement between the Sheriff's officer, and the plaintiff or his attorney has acquiesced therein.

Rule absolute, without costs.

Bolland was for the Sheriff, and *Nolan* and *Abraham* for the plaintiff. (*a*)

(*a*) Vide *R.* v. the *Sheriff of London*, 1 *Taunt.* 111; *R.* v. the *Sheriff of Surrey*, 9 *East.* R. 567; and *Same* v. *Same*, 7 T. R. 452.

ABRAHAM *against* NOAKES.

Friday, *Nov.* 12th.

Notice at the foot of common process, directing the defendant to appear on '*Friday* the sixth of *November*,' instead of *Saturday* the 6th of *November*, held irregular; but the proceedings were set aside without costs. (*a*)

THIS defendant was served with process returnable on the first day of Term, but the notice subscribed at the foot directed him to appear on *Friday* the sixth of *November*, instead of *Saturday*, on which day, in point of fact, the sixth of *November* fell. On *Saturday* morning, after the defendant had been served, his son called upon the plaintiff and said, "I believe your demand is 20*l.* 6*s.* 6*d.*" The plaintiff replied that it was, and ex-

(*a*) *Vide Eldon* v. *Haig*, *ante* 11. In *Steel* v. *Campbell*, 1 *Taunt.* 424, the Court held, that the circumstance of an impossible year being mentioned in the notice, as to the 20th of *January* 1808, instead of 1809, was not a sufficient ground for setting aside the proceedings. But the statute does not require the year to be inserted, but only the day of the month, which must be set forth in words at length. However, if it had not been for the decision of the Court in *Abraham* v. *Noakes*, *supra*, it might have been questioned whether, as the stat. does not require the day of the week to be inserted, the words of the stat. being, "appear in his Majesty's Court at ———, at the return thereof, being the day of ," the day of the week might not have been rejected as surplusage. 5 *Geo.* 2, *c.* 17, *s.* 4. In *Harden* v. *Wood*, *ante*, 500, the service of the writ was set aside, because the defendant was called *James* in the notice, when he was named *William* in the former part of the copy of the writ.

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pressed an unwillingness to take it, but he was at length prevailed upon to take the money, observing at the time to the young man (who acknowledged that his father had received the writ,) "you will pay Mr. Pearson the attorney his expences." However, without making any answer to this observation, the young man paid the money and took a written receipt for it, but did not at that time state that there was any objection to the process in point of regularity. *Espinasse* on a former day moved to set aside the writ (*a*) for the irregularity above stated; and

Comyn now shewed cause on an affidavit stating the above mentioned facts, and in addition thereto, that the attorney's clerk had been misled by *Wing's* almanack when he inserted "*Friday* as the sixth of *November*," instead of *Saturday*. Otherwise, he contended that the writ was regular, the defendant being required in the body of the writ to appear at the return thereof, which in point of fact was the sixth of *November*. He submitted however, that the facts contained in his affidavit were sufficient to discharge the rule with costs.

The COURT said that the writ was clearly irregular, and therefore that the rule must be made absolute, but without costs; for though there were two inconsistent parts in the writ, yet perhaps they might amend one by the other.

Rule absolute without costs.

(*a*) But quere if the rule should not have been to set aside the service of the writ, and not the writ itself, for this irregularity, *Groyn* v. *Lee*, 5 *Taunt.* 651; *Young* v. *Wilson*, *id.* 664; *Humphe* v. *Cullingwood*, *ante*, 384; *Lloy* v. *Maurice*, 9 *East*, 528.

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Friday, November 12th.

The affidavit to enter up judgment on an old warrant of attorney must state positively that defendant was alive at some time within the Term. Stating that he was seen alive on the 5th *November*, and that deponent "verily believes him to be now living," is not sufficient (*a*).

JULIET *against* HARPER.

E. *LAWES* moved to enter up judgment upon an old warrant of attorney, on an affidavit stating that the defendant was alive on the 5th instant, and that the deponent verily believed him to be now alive.

(*a*) Vide —— v. *Hobson*, *ante* 314; *Harris* v. *Wade* and *Stone*, *ante* 322. So an affidavit made in *Hil.* T. stating, that the defendant was alive on *Saturday*, the 22d *January*, the 23d being *Sunday*, is not sufficient. *Anon. Hil.* 1814, *Jan.* 24. *Twiss* moved for judgment on an old warrant of attorney, on an affidavit stating, that the party was alive on *Saturday* the 22d *January*; the first day of the Term (the 23d of *January* being Sunday,) and suggested that there was a case in *Tidd's* Prac. where it was so held. *Sed, per totam Curiam.* That case had been overruled (see *Tidd*, 6th ed. 580,) and Lord *Ellenborough* Ch. J. said, that the affidavit in the present form was not sufficient, and directed that it might be amended, and the matter moved again. Rule refused.

An affidavit for entering up judgment on an old warrant of attorney, that the party was alive on the 22d *Jan.* the 23d the first day of the Term being *Sunday*, is not sufficient.

So in *Mich.* T. 1814, *Nov.* 8th. *Best* moved to enter up judgment on an old warrant of attorney, on an affidavit that the defendant was alive on the 5th of *November*; and *Taddy* on the same day made a similar motion, on an affidavit, stating that the party was alive on the 1st; but in each of these instances the *Court* refused the rule, and *Le Blanc* J. said it was never done; defendant must be alive in full Term. *Eyles* v. *Warren*, 4 *M.* & *S.* 174, MSS.; *Tidd*, 580, S. P.

An affidavit for judgment on an old warrant of attorney must shew that the party was alive in full Term.

In *Hawkins* v. *Purnest*, *Trin.* T. 1814, *June* 25, an affidavit stating, that the party was alive about ten days ago (which by computation would be within the Term), was held insufficient for the uncertainty. *Harris* moved for judgment on an old warrant of attorney, on an affidavit sworn at *Axminster* on the 23d *June*, stating, that the party was alive about ten days ago, the Term having begun on the 10th of *June*. *Sed per Curiam*, It is not sufficient. Rule refused.

An affidavit for entering up judgment on an old warrant of attorney, stating that the party was alive about ten days ago, (the affidavit being sworn on the 23d of *June* and the Term began on the 10th) is insufficient.

So in *Anon. Trin.* T. 1814, *June* 22d. *Heath* moved for judgment on an old warrant of attorney, on an affidavit made the 18th of *June*, that the party was alive *about* seven days ago. The Term began on the 10th of *June*. *Sed per Bailey* J. It will not do. Rule refused.

An affidavit for entering up judgment on an old warrant of attorney, that the party was alive about seven days ago (the affidavit being made on the 18th of *June* and the Term beginning on the 10th,) is not sufficient.

But an affidavit that a letter has been received, dated within the Term, by a person acquainted with the defendant's hand writing, is sufficient. *Anon. Hil.* T. 1814, *January* 31. *Campbell* moved to enter up judgment on an old warrant of attorney, upon an affidavit, that a person knowing the handwriting of the party, had received a letter from him on the subject of his debt, dated the 26th of *January*, (a day in Term) and that he believed it was his handwriting. And *per Le Blanc* J. The affidavit is sufficient.

Judgment entered up on an old warrant of attorney on an affidavit that a letter had been received from the party dated in the Term.

In *Anon. Hil.* T. 1818, *Feb.* 11th. An affidavit stating that the party was

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PER CURIAM. This is an insufficient affidavit. The party must be sworn to be alive within the Term. The deponent here swears that he saw the defendant alive on the 5th instant; but he may have since died; and his belief that the defendant is now living, may be founded upon the information of somebody else, which is not enough.

Rule refused.

On motion in *Hilary* Term to enter up judgment on old warrant of attorney, where the party is abroad and there is only an affidavit that he was alive up to a certain time in *Trinity* Term, judgment granted as of that Term.

abroad, but was seen alive in *Trinity* Term last, was held sufficient to authorize judgment to be entered up as of that Term. *Alderson* moved to enter up judgment on an old warrant of attorney. The defendant lived at *Honduras*, and of course no affidavit could be made of his being alive within the Term; but the affidavit stated him to be alive up to a certain time in *Trinity* Term last. The *Court* said, all they could do was, to give judgment as of *Trinity* Term last, otherwise they might be giving judgment against a person after his death. *Rule so* granted.

A rule *nisi* only is granted in the first instance on a motion for entering up judgment on warrant of attorney 23 years old.

In order to enter up judgment on a warrant of attorney above twenty years old, a rule to shew cause only is granted in the first instance. *Anon. Hil.* T. 1816, *Jan.* 23d. *Bolland* moved for leave to enter up judgment on a warrant of attorney given in 1792, on the usual affidavit. *Per Bayley* J. It must only be a rule *nisi*.

Rule for entering up judgment on an old warrant of attorney absolute in the first instance, though given to secure payment after the death of the defendant's father, this being different from a *post obit* security.

But if the warrant of attorney bears date within twenty years, the common affidavit of the due execution of the warrant of attor ney, that the debt is unpaid, and that the parties are alive, is sufficient to induce the Court to grant a rule absolute. By all the Judges in the Treasury Chamber, *Nov.* 16th, 1750, *Barnes*, 47; *Tidd*, 579. And a warrant of attorney to secure the payment of money on the death of the defendant's father, is within the meaning of the rule. *Anon. Hil.* T. 1816, *Jan.* 24th. *Gaselee* moved for judgment on a warrant of attorney above ten and under twenty years old. He doubted whether the rule should be absolute in the first instance, the money which the warrant of attorney was intended to secure, being payable after the death of the defendant's father. And he mentioned the case of *Lushington* v. *Waller*. *Mich.* T. 29 *Geo.* 3, 1 *Hen. Bla.* Rep. 94, in C. P. that where judgment had not been entered within a year and a day, on a warrant of attorney given with a *post obit* bond, payable on the death of the defendant's father in case the defendant should survive, and the obligee did not apply to the Court for leave to enter it till after the death of the defendant's father, the Court of C. P. would only grant a rule to shew cause. *Sed per Curiam.* A *post obit* bond is a security of a different nature. There is something uncertain in the instance of a *post obit* bond, but here there is nothing of the kind. The warrant of attorney in the present case is for the payment of money absolutely, and at all events, though payment is postponed till after the death of the father. *Per Curiam.* Rule absolute.

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BRILL, GENT. ONE, &c. *against* NEELE.

Tuesday, November 16th.

A declaration beginning in debt, and containing some counts, stating, that the defendant being indebted, undertook and *promised* to pay, &c. whereby *actio accrevit*, and other counts framed in debt, stating that defendant was indebted in a certain sum to be paid to plaintiff, whereby, &c. is bad for the misjoinder. "A count charging that defendant undertook and *promised* to pay is in *assumpsit* and not in debt, although it conclude, whereby an action hath accrued." The form in debt is, that the defendant agreed to pay. (*a*) *Semb.* That in an action of debt on simple contract, a writ of enquiry cannot always be dispensed with; for instance, in debt for the value of foreign money, and other cases, in which a judgment by default is an admission of the contract stated in the declaration, but not of the exact sum mentioned in it. (*b*).

ACTION by an attorney for his bill of costs. The declaration commenced as usual in an action of debt: First count, that whereas the said

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(*a*) *Dalton* v. *Smith*, 2 *Smith's* Rep. 618, *s.* 8. The word "promise" does not seem to be absolutely necessary, even in an action of *assumpsit*. For in *Mountfort* v. *Horton*, 2 New Rep. 62, where the first count of the declaration, which was joined with other counts framed in the usual form in *assumpsit*, omitted the mutual promises, and only stated an agreement between the plaintiff and defendant, and an objection was made that the first count was not properly joined with the others, because the word agreed was not equivalent to promised, but was a mode of declaring, proper only for an action of debt; the objection did not prevail, and the Court said, that an agreement to pay money was a promise to pay money, and that the agreement on which the action of debt is founded, is itself a promise. 2 New Rep. 62. Motion in arrest of judgment after *non-assumpsit* pleaded. And in *Starkey* v. *Cheesman*, 1 *Salk.* 128; *Carthew*, 510, a declaration against the drawer of a bill of exchange, without alleging any promise, was held good, because it was said that the drawing of a bill was of itself a promise. These determinations upon the action of *assumpsit* do not strictly apply to debt, if the objection in the latter case be, that the promise is only ground of an action for unliquidated damages; and there are some decisions opposed to them, for in *Bac.* Abt. tit. Assumpsit a case is cited, in which *super se-assumpsit* on an *insimul computasset* was left out, and a distinction was endeavoured to be taken between a case where the law raises the promise, and a case where the promise is special. But the Court held, that it was necessary in every instance to allege a promise, for the law does not in any case create a promise in pleading, but gives sufficient evidence to a jury to find a promise. *Sid.* 306; 2 *Keb.* 97; 6 *Mod.* 131, S. P.; and see *Morris* v. *Norfolk*, 1 *Taunt.* 217, 8, *Com.* Dig. Assumpsit, *H.* 3. In *Comyn's* Digest, title Debt, *A.* 8, it is laid down, that debt lies upon every express contract to pay a sum certain; and after enumerating other instances, the author adds, so debt lies, though the contract be by way of promise, 1 *Rob.* Ab. 593, c. 10, 15, 17; Yearbook, 37 *Hen.* 6, 9, *a*; 17 *Edw.* 4, 5, *a*; *Alleyn*, 6, &c. But these positions do not relate particularly to the form of the count. In the same book, tit. Pleader, 2 *W.* 11, it is said, if the plaintiff declares in debt upon a contract, he ought to show the certain contract where the contract is express,

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defendant heretofore, to wit, on, &c. at &c. was indebted to the said plaintiff in the sum of —*l.* for the

as upon a *mutuatus*, &c. Upon a sale or other agreement executory, 1 *Bro.* Ent. 160, 165; for a salary upon a *retainer*, 1 *Bro.* Ent. 176; for *fees*, 1 *Bro.* Ent. 172; and see the form of debt, on an award, *Coppin* v. *Hurward*, 2 *Saund.* 127 (*e*); and the other instances are stated of debt on contract, implied by law. A declaration therefore, framed like the first counts in *Brill* and *Neale*, and stating, that defendant was indebted for money due to the plaintiff as an attorney, for work and labour and fees on the retainer of the defendant, would be sufficient, without farther alleging that the defendant undertook or agreed to pay or alleging, "whereby," &c. see *Emery* v. *Fell*, 2 T. R. 28; *Palmer* v. *Stavely*, 12 *Mod.* 510; and several forms, referred to in 2 *Chitty* on Pleading, 3d ed. 180, n. (1.) The beginning of the count, that the defendant became indebted, is the material part, and must contain a sufficient *ground* of action; and the allegation, that the defendant undertook and promised, is introduced, though unnecessarily, to point out the *form* of action, that the defendant may know how to plead, and the Court how to give judgment. For instance, the omission of the promise in actions of *assumpsit* on bills of exchange, &c. (see the cases *supra*), if it would be sustainable on special demurrer, seems to throw some embarrassment in the way of the defendant, for the plea of *non-assumpsit* would hardly be adapted to a declaration in this form, and yet the plaintiff cannot certainly by this mode of declaring deprive the defendant of the benefit of pleading the general issue. The conclusion, whereby an action hath accrued, &c. would not either aid or prejudice the previous statement of the liability, even after the verdict, according to the cases of *Jackson* v. *Peshett*, 1 *M.* & *S.* 231; *Le Brett* v. *Papillon*, 4 *East*, 509; 5 *East*, 270, 1; 3 *Lev.* 235-6.

(*b*) In *Com.* Dig. Pleader, 2 *W.* 7, it is laid down, that if there be a sale goods for two jewels, &c. in certain, the declaration may demand the jewels, &c. *Andr.* 118. And if debt be brought for so much Flemish money, of the value of so much in *English* money, it is well; but then the jury ought to inquire of the value, or a writ of enquiry must issue before judgment, *Plaine* v. *Bagshaw*, *Moore* 704, Cro. El. 536, *Tidd* 593, S. C. That case was debt on bond, and the plaintiff demanded 47*l.* 8*d.* *Flemish* money, amounting in value to 40*l.* 2*s.* 6*d.*; and after verdict for the plaintiff on *plene administravit*, and judgment *quod recuperet debitum prædictum*; and on error, in the Exchequer Chamber, the Judges held that it was a ground of error, that the jury had not enquired of the value, and no writ of enquiry had been awarded; they said the judgment should have been *quod recuperet*, the 47*l.* 8*s.* 8*d.* *Flemish* money, and a writ should have been awarded to enquire of the value. But it is said, that at the present day a writ of error could not be brought on that ground, 4 *Taunt.* 148; 2 *Str.* 878. In *Rands* v. *Beck*, *Cro. Jac.* 617, where debt was brought in the *detinet*, on a bill obligatory to recover 600 gilders of *Polish* money, of the value of 220*l.* of lawful money of *England*, and it was objected that the action should not have been brought in the *detinet* only because it was on a contract, the Court held the declaration was right, because the plaintiff was not to recover the gilders, but the value of them found by the jury; and it was said the

work, labour, care, diligence and attendance of the said *W.* by him the said *W.* before that time done, performed, bestowed, as the attorney and solicitor of and for the said *J.* and upon his retainer in and about the prosecuting, defending, and soliciting of divers causes, suits, and businesses for the said *J.* and for certain fees due and of right payable to the said *W.* in respect thereof; and also for other the (*a*) work and labour, &c. in drawing deeds, &c.; and being so indebted, he the said *J.* defendant, in consideration thereof afterwards, to wit, on &c. aforesaid, at &c. aforesaid, *undertook and*

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same reason applied as in an action against an executor, in which case the action must be in the *detinet*, because the sum is uncertain, and the plaintiff can only recover according to the assets. *Com.* Dig. Pleader, 2 *W.* 7. In *Holdip* v. *Otway*, 2 *Saund.* 107. which was an action on bond, before the stat. 8 & 9 *W.* 3. *c.* 11. the Court of King's Bench on a writ of error being brought, said that it was the practice both of that Court and of the Common Pleas, on a judgment by default, to tax the damages as well as costs of suit, whether large or small; but if the plaintiff will not assent to it, he may have a writ of inquiry of damages if he will; and in *Blackmore* v. *Flemyng*, 7 T. R. 116. the Court held authority of this case that the plaintiff might issue a writ of inquiry in an action of debt on judgment to recover interest and damages, the judgment being of seventeen years standing. The sum recovered, is either awarded or supposed to be awarded to the plaintiff by the Court or assessed by the jury; and it is said that the Court may in all cases assess the damages without a writ of inquiry, 2 *Wils.* 248, 368; 4 *Taunt.* 148; 2 *Saund.* 107. n. 2. but the Court will not assess damages, nor refer them to be assessed by the officer of the Court, where the action is brought on a bill of exchange for foreign money, or in other cases where the amount is uncertain. See *Maurice* v. Lord *Massareene*, 5 T. R. 87. 4 T. R. 275. 8 T. R. 648. 2 *Barn.* and *Ald.* 118; *Tidd*, 6th ed. 598. and the reason is given by the Court in *Cro. Eliz.* 536. Hence it should seem to be necessary in all cases where an action is brought, either in the old form in the *detinet* for goods, &c. or in the *debet* and *detinet* on an agreement to pay an unascertained sum, that a writ of inquiry should be issued to ascertain the amount. And the general doctrine that a writ of inquiry is unnecessary in debt because the judgment is final, (*Tidd*, 593, 599.) must it seems be understood with this qualification; indeed as it is now considered unnecessary for the plaintiff in any case to recover the exact sum demanded in an action of debt, it would be more agreeable to the principles of justice, if the same rule were to apply with respect to the issuing of writs of inquiry in an action of debt on simple contract as in an action of *assumpsit*, than to permit a plaintiff to issue execution without ascertaining by a jury the exact amount of his debt.

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then and there faithfully promised the said plaintiff to pay him the said last-mentioned sum of money, when he the said *J.* should be thereunto afterwards requested, whereby and by reason of the said sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiff, to demand and have of and from the said defendant, the said last-mentioned sum of —*l.* parcel of the said sum above demanded. Second count *quantum meruit.* In consideration that the plaintiff at the request of the defendant had done, performed, &c. the said defendant *undertook and then there faithfully promised* the said plaintiff to pay him so much money as he therefore reasonably deserved to have of the said defendant, when he the said defendant should thereunto afterwards be requested, &c. whereby *actio accrevit,* &c. concluding as in a count in debt. Third count, and whereas also the said *J.* defendant afterwards, to wit on &c. at &c. aforesaid, was indebted to the said plaintiff in the further sum of —*l.* for work and labour, care and diligence, before that time done, performed, and bestowed, by the said plaintiff, by him and his servants for the said defendant, and at his like special instance and request, and for divers journies and attendancies before that time taken, performed, and given by the said plaintiff for the said defendant at his like special instance and request, by means of which last-mentioned premises and of the said last-mentioned sum of money, still remaining unpaid, an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said last-mentioned sum of *l.* other parcel of the sum above demanded. Fourth count, *quantum meruit;* and the fifth and sixth counts, and the other common counts with which the declaration concluded, were framed in debt. Demurrer, assigning for cause the *mis-joinder* of counts framed in *assumpsit* with counts in debt. Joinder in demurrer.

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Espinasse in support of the demurrer. The causes of demurrer pointed out are, that in the declaration there is a misjoinder of counts, part being in *assumpsit* and part in *debt*. He observed that there would be no difficulty in supporting the general ground of the demurrer because counts in different forms of action, cannot be joined; and he contended that the first two counts of this declaration were in *assumpsit* and the others in debt. The Courts have always been anxious to preserve distinct, not the forms of action only, but the forms of pleading, and to discourage any departure from the ancient and established precedents, which answers no good, and is unnecessary, or tends to make the records of the present times different from all the ancient ones. Forms of declaration in debt on simple contract, as this is, are to be found in *Mallory*, *Aston*, *Rastell*, and *Coke's Entries*. They are in the simple form used in the latter counts of this declaration, and nothing like the first two. The language of those two counts is precisely the language of the counts in *assumpsit* and not in debt, until the word *whereby*; and then what before was pure *assumpsit*, assumes the language of the action of debt. The action of *assumpsit* is founded on promises, that of debt on contract: the declaration in *assumpsit* therefore says, the defendant undertook and *promised*. In debt it is, the defendant undertook and *agreed*, though the word undertook is not generally used. That this is the settled form of pleading was decided in the case of *Dalton* v. *Smith*, 2 *Smith's* Rep. 618. That case in every respect applies to this. The declaration has precisely the averment there objected to; and Mr. Justice *Lawrence* expressly said, this is a count in *assumpsit*. If it should be contended, that the concluding words, whereby, and by reason of the non-payment of the money an action hath accrued, have the effect of rendering this a count in debt, (though it may be

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be safely relied upon that that allegation being merely an inference of law cannot cure the antecedent fault in pleading,) still giving it all the effect possible, it will nevertheless be bad. The word *whereby* is a relative Term, and the antecedent is the whole preceding clause "that the defendant undertook *and promised*." If it contains any cause of action, it is for a breach of that promise and undertaking; which is a question of damages, and therefore improperly stated as a ground of the action of debt; for debt cannot be supported for unliquidated damages either as the sole or joint cause of action. In debt on simple contract, it is peculiarly necessary to keep distinct the actions of debt and *assumpsit*, as by suing in debt, the defendant is deprived of the benefit of contesting the amount of the plaintiff's demand on the execution of a writ of inquiry, and left at the mercy of the plaintiff. This declaration therefore, which comprises both, is in point of principle informal; but that such a joinder is bad on demurrer has been held in several cases.

The COURT said, he need not argue that point.

Tindal contra, contended, that if there were any material averments in either of the first two counts upon which the defendant might take issue, the declaration would be good. In those counts the plaintiff alleged that the defendant "undertook to pay," and therefore if the defendant had not undertaken to pay, there was nothing against his pleading *nil debet* to that part of the declaration. If then the plaintiff could have pleaded such a plea to the first two counts of the declaration, there was no pretence for this demurrer. The material allegations were, "that the defendant was indebted and undertook to pay the debt which he owed to the plaintiff." He admitted that the first two counts were drawn in an inartificial and careless manner; but

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he also contended that both might be rejected as surplusage. It was sufficient if he could sustain the third count, which was free from the objection alleged; and he contended that he might do so if the first two were rejected as surplusage. (*a*) It was true there

(*a*) Although some of the counts might be demurrable, yet if they were all framed substantially in the same form of action, the general demurrer to the whole declaration could not be supported, but the plaintiff would have judgment on those parts that are good. 1 *Saund.* 286, n. 9; 2 *Saund.* 380, n. 1, 4. *Cro. Jac.* 557; 11 *East*, 565, *Powdich* v. *Lyon*; 1 *Wils.* 252, *Judin* v. *Samuel*; 1 *New* Rep. 43; 6 *East*, 333, S. C. and on the other hand, if the ground of demurrer be the misjoinder, the defendant must demur to the whole declaration, *Kingdon* v. *Nottle*, 1 *M.* and *S.* 355. And the plaintiff cannot cure the defect by entering a *nolle prosequi* to a part of the declaration. *Rose* v. *Bowler*, 1 *Hen. Bla.* 108; *Drummond* v. *Durant*, 4 T. R. 360; *Bertram* v. *Gordon*, 6 *Taunt.* 444; 1 *Saund.* 285, note 5. But after verdict, if no evidence has been given on some of the counts, and the verdict has been taken generally, it may be amended according to the evidence by leave of the Judge who tried the cause, and the objection of the misjoinder removed. *Harris* v. *Davis*, *Mich.* T. 1818, *Nov.* 9, is to the same effect. This was an action against the defendant for raising a road, so as to occasion an injury to the plaintiff's adjoining close, and was tried before *Holroyd* J. at the Summer Assizes at *Hereford*, when a general verdict was obtained for the plaintiff, and general damages assessed. *Campbell* now moved for a rule to arrest the judgment, or else to set aside the verdict and have a new trial. The first count was partly in case and partly in trespass. The second count was entirely in trespass. The declaration stated in the first count, that the defendant wrongfully raised the road with earth, and this grievance was in case; but the count proceeded to state that the defendant wrongfully placed and laid earth on the hedge, and concluded that by reason thereof cattle strayed into the plaintiff's close. The second count was entirely in trespass, for choking up the hedges.

Where there is a misjoinder of counts, and one count is partly in case and partly in trespass, and another count is entirely in trespass, and no evidence was given as to the acts of trespass, the verdict, if taken generally, may be amended according to the evidence.

Holroyd J. The trespass was not proved. The earth was only put on the road, not against the hedge, and was only sloped down.

Abbott J. The second count is clearly framed in trespass. However, no evidence seems to have been given on this count, and then the plaintiff could prevent you from deriving any benefit from this motion by amending the verdict and confining it to that part of the declaration on which evidence was given. The Judge who tried the cause, directed the jury not to consider the trespass. You are at liberty to take a rule to arrest the judgment if you think fit, but it will only produce a contrary motion on the part of the plaintiff, who remitting the damages on the second count, will be intitled to the verdict, and damages on that part of the declaration on which alone any evidence was given.

Campbell then stated grounds on which he moved to set aside the verdict, and obtain a new trial. But the Court finally granted a rule *nisi* for arresting the judgment. 4 T. R. 794. Vide *etiam*, *Sutton* v. *Clarke*, 6 *Taunt.* Rep. 29.

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had been words introduced into those counts which ought not properly to have appeared, but being mere idle and useless words, they might properly be rejected. It had been admitted on the part of the defendant, that if the words had been, "that he undertook and agreed," then there would have been no objection to the declaration. That was a very nice and subtle distinction, which the Court would hardly adopt. It required very nice criticism to find out the difference between "*undertook and agreed*" and "*undertook and promised.*" There was no solid or substantial difference in these terms. In the very case referred to, it was held that in an action upon a *concessit solvere,* the word *agreed* was equivalent to *promise.* If then the word *agreed* be equivalent to *promise,* surely the word *promise* may be safely held to be equivalent to *agreed,* &c. What then became of the difference between these two words in a *concessit solvere.* Debt will lie upon a promissory note *Bishop* v. *Young.* (*a*) There can be no inconvenience in stating in the present declaration an actual positive existing promise, and there is a class of actions, it is well known, of debt on promise. It is clear that the person who drew these counts, thought it necessary to put in the word promise; but as that word was merely idle and useless, it might be rejected as surplusage.

ABBOTT Ch. J. I think the case cited in support of the demurrer is directly in point. It is our duty to discourage all innovations in the forms of pleadings, where there is no occasion for any alteration (*b*) The difference between actions of *assumpsit* and actions of debt is, that in the latter execution is immediately

(*a*) 2 *Bos.* and *Pull.* 78.

(*b*) This is the true qualification of alterations in ancient forms: see *King* v. *Fraser,* 6 *East,* 351, 2. Where an improvement can manifestly be introduced with advantage, there is no reason why pleading, like other arts and sciences, should not ameliorate; and accordingly many material alterations have of late been introduced. See the above case, and 1 *Saund.* 103.

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taken out. I do not mean to say that there are no exceptions where objection might be made to that course of proceeding, but that is generally the practice in actions of debt. I am of opinion in the present case, that the demurrer is well founded, and that judgment must be given for the defendant.

BAYLEY J. was of the same opinion; and intimated, that if in debt on a *quantum meruit*, or in other cases where a sum certain was not declared for, execution were issued without first executing a writ of inquiry, it might be ground of error, or at least would be irregular.

HOLROYD J. There are several cases of actions of debt, in which a writ of inquiry would be requisite where there is judgment by default, as in debt for foreign money. Then there must be a writ of inquiry to ascertain the value of the money in *English* money. Many other instances may be put, in which, though by letting judgment go by default the defendant may admit a contract in substance, as stated, yet he does not necessarily admit that the exact sum of money is due. I agree with the rest of the Court in thinking that this declaration is bad, and that the case referred to is precisely in point.

Judgment for the defendant (*a*).

(*a*) *Best* J. was absent.

In the Matter of ——— *one of the* JUSTICES *of the* PEACE *for the County of* BEDFORD.

Thursday, Nov. 18th.

A *mandamus* will not lie to compel a Magistrate to produce depositions taken before him on a charge of felony, for the purpose of founding an indictment of perjury against the deponents: the magistrate must be subpœnaed to produce the depositions, which may be read in evidence before the grand jury. (*a*)

BLOSSETT Serjeant, moved for a rule to shew cause why a writ of *mandamus* should not be issued, directed to a magistrate for the county of

(*a*) But in the case of the *King* v. *Smith*, *Stra.* 126, a rule was granted

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Bedford, commanding him to produce certain depositions taken before him, on a charge of felony, in order to enable the party against whom the complaint was made to institute a prosecution against the deponents for perjury."

ABBOTT Ch. J. This is an application completely without precedent; and as no case is cited in support of it, I see no reason why we should assume a power which it does not appear the law has afforded us. I am not aware of any thing at all analogous to such a motion. We have no power to issue a *mandamus* to a magistrate for any such purpose as that stated at the bar.

BAYLEY J. You may subpœna the magistrate before the grand jury, and from hearing the depositions taken before him read, the grand jury may make a presentment.

Rule refused.

after time had been taken to deliberate, to compel a justice of the peace to cause an examination taken before him to be produced at the *trial*, and to give the party a copy in the mean time: and in *Welch* v. *Richards*, *Barnes*, 468. in an action for a malicious prosecution, a rule was obtained for the committing magistrate to shew cause why he should not permit the plaintiff to inspect and take a copy of the information at his own expence, and cause the original information to be produced at the trial; and after cause shown, the rule was made absolute on the authority of the case in 1 *Stra*. The practice and authorities are stated in *Chitty's* Crim. Law, 1 vol. 88-9, 577, 585.

Friday, Nov. 19th.

BARNARD *and* ANOTHER, EXECUTORS *of* BARNARD *the Elder, against* HIGDEN.

When a plaintiff, sued as Executor, for a debt, which appeared on the trial to be claimable if at all in the character of surviving partner of the deceased, and was nonsuited; the Court refused to refer it to the master to tax the defendant's costs, it being doubtful whether justice would be done by such an order. (*a*)

THIS was an action for money had and received by the defendant to the use of the plaintiff's testator in his life-time. At the trial, an account-book was

(*a*) See 1 *B. & A.* 386. and other cases, *post.* An executor is liable to

produced, shewing the state of the accounts between the parties; by which it appeared that the present

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costs on a judgment of *non pros.* and if these be any ground for relieving him from the payment of costs, he should apply to the Court for leave to discontinue without payment of costs. *Anon. Hil.* Term, 1817. *Feb.* 12. On a former day a rule *nisi* was obtained, calling on the defendant to shew cause why the master should not review his taxation of costs, on the ground that he had allowed the defendant the costs of a *non pros.* the plaintiff being an executor. *Littledale* shewed cause against the rule, contending that an executor is liable to costs on a *non pros.*; and referred to the cases in *Haws* v. *Saunders*, 3 *Burr.* 1585; *Higgs* v. *Warry*, 6 T. R. 654. *Tidd*, 6th ed. 1013. 3 *Bos.* & *Pul.* 117. But Lord *Ellenborough* Ch. J. said, that that point was too clear to be disputed. *Gifford*, contra, in support of the rule, distinguished the cases referred to by *Littledale*, and observed that in *Hawes* v. *Saunders*, 2 *Burr.* 1584. the *non pros.* was signed for want of declaring in due time; and that in *Higgs* v. *Waring*, 6 T. R. 654. the defendant demurred to the plaintiff's action, and the plaintiff not having joined in demurrer, the defendant signed judgment of *non pros.* But in this case the action was brought on a bond, and circumstances prevented the plaintiff from proceeding. Those cases were founded on the wilful laches of the plaintiff. *Bayley* J. It is settled that an executor is liable to the costs of a *non pros.* *Abbot* J. The plaintiff, if he wished to have been relieved, should have applied to the Court and endeavoured to obtain leave to discontinue, and then he would have filed an affidavit, and the other party would have had an opportunity of answering it or not. Rule discharged.

An executor is liable to costs on a *non pros*; if he wishes to be relieved from costs, he should apply to the Court for leave to discontinue without payment of costs.

An executor is liable to costs on a *discontinuance*, if he has knowingly brought a wrong action. *Harris* v. *Jones*, 3 *Burr.* 1451. 1 Sir *W. Bla.* R. 451, S. C. *Melhuish* v. *Maunder*, 2 New Rep. 72. *Tidd*, 1013. but otherwise not. *Id. ibid. Baynhan* v. *Matthews*, 2 *Stra.* 871.

An executor when defendant is not liable to costs, *de bonis proprius* if he plead *plene administravit* or *plene administravit præter*, and the plaintiff admitting the truth of the plea, takes judgment of assets *quando acciderint;* but judgment may nevertheless be given for costs *de bonis testatoris. De Tastet* against *Andrade*, administrator, *Joaquim Andrade*, *Mich.* Term, 58 *Geo.* 3. 1817, 28th of *Nov.* *Assumpsit* on a promissary note made by the intestate. Plea of judgment recovered in King's Bench against the deceased by another creditor to the amount of 910*l.* and *plene administravit præter*, a sum insufficient to satisfy that judgment. The plaintiff prayed judgment for assets in *futuro. Littledale* on a former day obtained a rule to shew cause why it should not be referred to the master to see what was due for principal and interest on the promissory note, and *also to tax the plaintiff his costs*, and why the plaintiff should not be at liberty to sign final judgment without executing a writ of inquiry; relying on *Dearne* v. *Grimp*, 2 Sir *W. Blackstone's* Reports, 1275. where it was said that the plaintiff in a case of this nature is entitled to have his costs eventually *de bonis testatoris.*

On a judgment of assets *quando accederint*, upon a plea by an executor of a judgment outstanding, and *plene administravit.* the plaintiff is entitled to costs *de bonis testatoris.*

Chitty shewed cause, and submitted that the defendant was not liable to costs upon the plea of *plene administravit*, the plaintiff having admitted the

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plaintiffs were partners with their father in his lifetime, their names being used as members of the firm, although they had no personal interest in those accounts; and it appeared further that a commission of bankrupt had been issued against the plaintiffs and their other partner, and that the defendant had settled and adjusted all the accounts with the assignees, and it was sworn that the defendant verily believed the plaintiffs well knew the state of the accounts, and were informed by defendant that there was no claim upon him. The plaintiffs were nonsuited.

Denman last Term moved for a rule to shew cause why the defendant should not be allowed his costs in this action to be taxed by the master, contending that the plaintiffs might have sued in their own right as surviving partners of their father, and that the expedient of suing as executors, was a mere fraud, to deprive the defendant of his costs.

Reader now shewed cause, and said it was true that the plaintiffs were nonsuited at the trial, on the production of the pass-book, between these parties and the defendant; in which pass-book the present plaintiffs appeared as partners with their father, for their names were used as such; but in point of fact, they had

truth of the plea and taken judgment of assets in *futuro;* and he referred to *Noell* v. *Nelson*, 2 *Saund.* 217. *Tidd's* Prac. 6th ed. 1014. *Hullock* on Costs, 2d ed. 208. and to the forms in *Lil. Entr.* 475. *Tidd's* Forms, 4th ed. 2201. and *Tidd's* Practice, 6th ed. 1014. note c. The Court held that though the defendant, the administrator, was not personally liable to pay costs, yet that the plaintiff was entitled to be paid his costs out of the estate of the deceased, and that there was no reason why a person who had a lawful claim on the estate should be deprived of the costs incurred in recovering his debt and securing a preference by proceeding until he had obtained judgment to be paid out of future assets. Therefore though the executor was not liable *de bonis proprius*, yet that judgment might well be for costs, to be recovered *de bonis testatoris quando acciderint*, and that therefore the rule should be absolute, and the costs of the application to be costs in the cause, and not to affect the defendant personally.

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no interest in the transaction, and therefore he contended that the ground upon which this motion was made completely failed.

Denman in support of his motion, now proposed to shew by affidavits that this action might have been brought by the plaintiffs in their own right, and that they knew that the debt had been satisfied, and that they were proceeding vexatiously; and if so, the cases of *Comber* v. *Hardcastle* (*a*) and *Grimstead* v. *Shirley* (*b*) were decisive authorities in favour of this application.

The COURT was at first strongly disinclined to receive affidavits for this purpose; but for the sake of the argument, and to prevent the expence of another motion, they allowed *Denman* to go into them.

The affidavits stated that the plaintiffs and their father, the testator, were in partnership together previous to the year 1814, in which year a separate commission of bankruptcy was sued out against one of the plaintiffs, on which occasion the defendant and all the partners in the firm balanced and settled their accounts respectively. The affidavits went on to state as a further objection to the plaintiffs' right to sue as executors, the belief of the defendant that the debt claimed in this suit, even supposing it still existed, was not recoverable by the plaintiffs as executors, but if recoverable at all was recoverable by the assignees, under the separate commission So that the plaintiffs well knew they had no right to sue at all, but still less in the character of executors.

Denman therefore contended, that these circum-

(*a*) 3 *Bos. & Pul.* 115.

(*b*) 2 *Taunt.* 116. and see *Hollis* v. *Smith*, 10 *East*, 293; *Zachariah* v. *Page*, 1 *Barn. & Ald.* 386.

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stances brought the care precisely within the decision in *Comber* and *Hardcastle.* He submitted that the Court would hesitate before they laid down a rule which would sanction a plaintiff in describing himself as executor, in order to exempt himself from costs.

ABBOTT Ch. J. If we were to direct a taxation of costs for the defendant in this case, I cannot help thinking that our decision would be erroneous; for I do not think this is a case within the statute of 23 *H.* 8. *c.* 15. giving the defendant costs. I do not consider, that in making an order such as that which we are now called upon to make, we should be acting properly; for when the whole matter comes to be discussed, it may be extremely questionable whether such an order would be according to the justice of the case; and we ought to be perfectly satisfied that we should be doing justice before we acted upon the decision in the Court of Common Pleas. In taking upon ourselves such a jurisdiction, we ought to be well assured, that the defendant is really entitled to costs; but I do not think this a case in which we ought to be called upon to grant this application.

BAYLEY J. The case of *Grimstead* v. *Shirley*, is distinguishable from this; because there it clearly appeared that the plaintiff having sued as executor, added a count stating a cause of action for which he might have declared in his own right. Before the statute of *Glocester* a defendant had no right to costs at common law. The statute of *Henry* the 8th, gives the defendant costs in cases where the plaintiff is non-suited; but that statute speaks only of contracts made between the *plaintiff* and another person, and does not apply to an action at the suit of an *executor* upon a supposed contract with the *testator;* and this distinction was hinted

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at by the Court in *Strange* (*a*). I recollect a case, in which an action having been brought for diverting a water-course, against a tenant who was a very poor person; and upon an application to the Court of Common Pleas, the Court obliged the landlord to pay the costs, though he was no party to the suit; but there the costs were awarded on the ground that the defendant was merely a nominal party, and was sued as tenant, the landlord defending him (*b*). I think however the present case is too doubtful to call upon the Court to interfere.

HOLROYD J. was of the same opinion.

Rule discharged.

(*a*) *Marsh* v. *Yellowly*, 2 *Stra.* 1107-8; *Tattersall* v. *Groote*, 2 *Bos. & Pul.* 255, *per* Lord *Eldon*, C. J.

(*b*) *Vide* Doe dem. *Locke* v. *Franklin*, 7 *Taunt.* 9; 2 [illegible]. 66; 6 *Mod.* 309; *Runn.* Eject. 417; *Hickey* v. *Burt*, 7 *Taunt.* 48; *Webb* v. *Ward*, 7 T. R. 296; 3 *M. & S.* 283; 6 *Taunt.* 123.

BIRKETT *and* OTHERS *against* WILLAN *and* OTHERS.

Friday, Nov. 19th.

Where a new trial is granted after verdict for the defendant, on the ground of a misdirection of the Judge, and such rule is silent as to costs, and the plaintiff succeeds on the second trial of the cause, he is not entitled to the costs of the first trial. (*a*)

R. COMYN moved for a rule to shew cause why the master should not be directed to review his taxation, and allow the plaintiff the costs of a former trial

(*a*) Where the rule is silent as to costs, and a second trial takes place, the costs of the first trial are never allowed in K. B. whichever way the verdict may be found on the second trial, *Jackson* v. *Hallam*, *ante*, 20 and 22, *per Bayley* J. and cases there cited. In general, where the plaintiff submits to a nonsuit in consequence of the direction of the Judge, the Court will grant a rule for the nonsuit to be set aside and a new trial had, expressly without costs. *Harris* v. *Butterley*, *Cowp.* 483; [illegible] v. [illegible], 1 *Bla.* Rep. 670. And the same has been done in other instances. *Boswell* v. *Hogg*, 3 *Wils.* 146, C. P. *Rackham* v. *Jesup*, 3 *Wils.* 332. So in *Ellis* v. *the East India Company*, *Sayer*'s Law of Costs, ed. 1768, p. 158. 1 *Bla.* Rep. 298, S. C.; 2 *Burr.* 1216, S. C. where a verdict for the plaintiff was set aside, on the ground of evidence having been admitted at the trial of the usage and custom of merchants, the Court set aside the verdict without costs. And in *Haworth* v. *Samuel*, H. T. 1818, *Feb.* 10, MSS. it was laid down by Lord *Ellenborough* C. J. that in all cases where the jury have given a perverse verdict, the Court will grant a new trial without costs.

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of this action, the verdict obtained by the defendant on that occasion having been set aside on the ground of a misdirection of the learned Judge by whom the cause was tried, and a new trial awarded, in which the plaintiff succeeded, and obtained a verdict. The master in taxing costs had only allowed the plaintiffs the costs of the second trial. He admitted that it was a general rule, that where a plaintiff is nonsuited, or the verdict is found against him, he is not entitled to costs; but he submitted that this case was distinguishable from that general rule, inasmuch as a new trial had been awarded on the ground of a misdirection in point of law by the learned Judge who presided at the first; for the plaintiff on that trial did not fail in recovering a verdict from any fault of his own. No authority undoubtedly was to be found in support of the motion. But suppose instead of moving for a new trial, the plaintiffs had tendered a bill of exceptions to the learned Judge's direction, and that the latter had sealed it; and upon a writ of error being brought, a *venire de novo* was awarded, he submitted that the plaintiff would stand in the same situation as if the jury had found for him upon the first trial. It is said in a note to Mr. Serjeant *Williams'* edition of *Saunders,* that under such circumstances the plaintiff shall be put in the same situation as if he had succeeded on the first trial;

(*Pochin* v. *Pawley*, 1 *Bla.* Rep. 670; *Phillips* v. *Fowler*, *Comyn* Rep. 525; *Barnes*, 441; *Willes*, 448.) but that where the verdict proceeds from a mistake or error in the jury, the new trial is granted on payment of costs; eventually the Court directed under the particular circumstances of the case, that the costs should abide the event.—See also *Hale* v. *Cove*, 1 *Stra.* 642; *Macrow* v. *Hull*, 1 *Burr.* 12; *Bright* v. *Eynon*, 1 *Burr.* 393-4; *Tidd*, 936. Where the cause was taken by mistake, the Court refused to make the payment of costs a condition of the rule for a new trial. *Ethrington* v. *Kemp*, *East.* T. 1815, *April* 19. *Heath* moved for a new trial, the cause having been taken as an undefended one by mistake, and it was not in the paper. The Court granted a rule *nisi,* which was afterwards made absolute. *Taddy*, contra, endeavoured to maintain that the new trial should only be granted on payment of costs; but the Court did not assent to this argument.

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and for this several authorities are cited. In a late case of *Jackson* v. *Hallam* (*a*) it was held, that the defendant having applied for and obtained a new trial after a verdict against him, instead of going down again to trial gave a cognovit confessing the action, he was liable to pay the costs of the former trial.

PER CURIAM. The case last cited is clearly an authority against this application, because there the plaintiff succeeded. In the present case, it is admitted that the plaintiff failed in the first action, by having a verdict found against him; nothing can be clearer than that he is not entitled to the costs of the trial in which he has failed. We are called upon to suppose a case which does not exist, and thereby concede grounds for founding this motion. The practice of the Court applicable to cases of this description has been long established, and we ought not hastily to break in upon it. The rule is clearly settled, that a plaintiff who fails in bringing his action is not entitled to call upon the defendant to pay his costs, even though he afterwards succeeds upon a new trial. The case of *Lickbarrow* v. *Mason* (*b*) is a clear authority upon this point, for there it was held, that where a *venire de novo* is awarded, the party succeeding is only entitled to the costs of the second trial.

Rule refused.

(*a*) *Ante*, 19. (*b*) 6 T. R. 131.

BAILDON *against* PITTER.

Friday, Nov. 19th.

A defendant residing within the jurisdiction of the Court of Requests for the city of *Bath*, is entitled to be sued in that Court for a debt under 10*l*. though the cause of action accrued and the plaintiff resided out of the jurisdiction. And if such an action be brought elsewhere, the Court, on motion, will deprive the plaintiff of costs. (*a*)

READER, in the course of last Term, obtained a rule to shew cause why upon payment of 8*l*. the defendant should not be exempt from costs, pursuant

(*a*) The Court of Requests for the city of *London* did not formerly

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to the 45 *Geo.* 3. c. 67. "An act for the more speedy and easy recovery of small debts within the city of *Bath*, and the liberty and precincts thereof." And why

hold jurisdiction over causes, unless both the plaintiff and defendant were resident in the city. *Brooks* v. *Moravia*, 2 *Hen. Bla.* Rep. 220. but under the 39 and 40 *Geo.* 3. c. 104, the jurisdiction of this Court is extended to debts not exceeding 5*l.* due to any person or persons, whether residing within the city or elsewhere. But the hardship which this provision has imposed on plaintiffs, has been the subject of observation, and is said to render it necessary, that the Court should not extend the methods of redress pointed out by the statute, beyond what the terms of it will strictly warrant. *Board* v. *Parker*, 7 *East*, 50. The *Birmingham* Court of Requests act also, (47 *Geo.* 3. sess. 1. c. 14, loc. and pers.) does not require the plaintiffs to reside within the jurisdiction, or the cause of action to accrue there, in order that the jurisdiction of the Court may attach; and no person to whom a debt, or cause of action of a certain nature, not exceeding 5*l.* is owing from a person resident within the jurisdiction of that Court, can recover any costs if he sue elsewhere than in that Court. *Ixes* v. *Rogers*, 4 *Taunt.* 150; *Tidd*, 989. The *London* Court of Conscience act extends to actions brought against attornies, for debts not amounting to 5*l.* and the Court in such a case will grant a rule for staying proceedings, on payment of the debt without costs, without obliging the plaintiff to enter a suggestion on the roll, *Robinson* v. *Vickers* and another, *Trin.* T. 1816, *June* 29. *Spankie* moved to stay the proceedings in this case, on payment of the debt without costs. He stated that the action was brought against an attorney for less than 5*l.*; that the attorney resided and carried on business in the city of *London*, and within the jurisdiction of the *London* Court of Conscience act, and that he occupied a house there jointly with his partner. He contended that the clause extends the case to attornies, notwithstanding any claim of privilege, and that the practice was to stay proceedings upon paying the money without costs; for there was nothing in the clause respecting attornies, as to entering a suggestion on the roll. *Comyn*, *amicus curiæ*, said he had obtained a rule in that form this Term. *Holroyd* J. at first asked if the facts should not be entered on the roll by way of suggestion, but afterwards a rule *nisi* was granted in the terms prayed. And see *Dunster* v. *Day* and *Smith*, 8 *East*, 239; *Foott* v. *Coare*, 2 *Bos.* & *Pul.* 588; *Barney* v. *Tubb*, 2 *Hen. Bla.* 351; *Lawson* v. *Moggridge*, 1 *Taunt.* 397. And a suggestion cannot be entered under the statute 23 *Geo.* 3. c. 33. in order to entitle the defendant to double costs after judgment by default and writ of enquiry, but only where there has been a trial. *Harris* v. *Lloyd*, 4 *M.* & *S.* 171. *Tidd*, 993. The defendant is not at liberty to enter a suggestion on the roll, under the *Middlesex* Court of Conscience act, where a verdict is found for 1*s.* damages on an issue taken on a plea in abatement of misnomer. *Welchen* v. *Le Pelletier*, *Hil.* T. 49 *Geo.* 3. *Assumpsit* for money had and received. The defendant pleaded misnomer in abatement, and issue being taken thereon, a verdict was obtained for the plaintiff, with 1*s.* damages. *Gaselee* moved to enter a suggestion on the roll under the *Middlesex* Court of Conscience act. *Garrow* and *Espinasse* shewed cause. *The Court* held that the act did not apply to issues of this description, and discharged the rule.

Under the *London* Court of Conscience act, the practice is to stay proceedings, on paying the money without costs and not to require a suggestion.

The defendant cannot enter a suggestion on the roll under the *Middlesex* Court of Conscience act, where a verdict is found for 1*s.* damages, on an issue taken upon a plea in abatement of *misnomer*.

the plaintiff should not be restrained from suing out execution in this cause. 1819.

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The case disclosed upon the affidavits was this:— The action was in *assumpsit* upon a promissory note made by the defendant in *London* for payment of 10*l.* to a tradesman for goods sold and delivered there, and there indorsed to the plaintiff, and a verdict was recovered in this Court for 8*l.* at the second Sittings in last Term. The plaintiff and defendant resided in *London* when the cause of action arose there, but the defendant afterwards removed to the city of *Bath*, and resided there at the time the action was commenced; and the question was, whether the plaintiff was to be deprived of his costs by virtue of the 45 *Geo.* 3. c. 67.

Chitty now shewed cause against the rule, and contended that the action was well brought in this Court, and that there was nothing in the provisions of the *Bath* Small Debt act, which could compel the plaintiff to sue the defendant, within the local jurisdiction. He submitted that the act was passed solely with a view to the recovery of small debts contracted in the neighbourhood of *Bath*, as appeared from the preamble of the act. The motion was founded upon the 47th section of the act, which though general in its terms, must yet be considered as supposing that the debt had been contracted within the jurisdiction of the inferior Court, which was not the case here; and the Court, in construing this act of parliament, must look to the policy and object which the legislature had in view. The Court would not extend the operation of this statute, unless there were words which clearly and distinctly comprehended this case. If the Court were to consider the jurisdiction of this inferior Court as extending to the recovery of debts contracted out of its limits, such construction of tue act would lead to the most mischievous consequences. Suppose a defendant contracting a debt in

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Yorkshire, chose to go and reside in *Bath*, would the Court say, that the plaintiff was bound to carry his witnesses from the former to the latter, in order to recover his debt? and yet such was the proposition to be contended for on the part of the defendant. The act gave the Court no power of compelling witnesses out of the jurisdiction to attend, so that the plaintiff might be totally unable to prove his debt. In *Bac.* Ab. tit. Courts, D. 4. and in *Rol.* Ab. 545, 6, it is laid down, that the jurisdiction of inferior Courts is to be construed strictly, and that such Courts have no cognizance over debts contracted out of their limits. S.P. 1 *Leo.* 50. In *Trevor* v. *Wall* (*a*) it was held, that in an inferior Court the declaration must allege, that the money was had and received within the jurisdiction, as well as that the defendant promised to pay it. In furtherance of his argument he also cited *Rex* v. *Danser* (*b*).

BAYLEY J.—That was the case of a common law Court extended by an act of parliament, and consequently does not affect the present, which is a Court entirely new, and owing its origin to the act of parliament.

Reader, in support of the rule. The Court of Requests at *Bath* derives it authority from this act of parliament, and therefore all the arguments which might arise from decisions referable to inferior Courts of common law jurisdiction, have nothing to do with the present case. Where a new Court is created by act of parliament, its authority must depend entirely upon the construction of the act which gives it jurisdiction. The Court therefore in deciding the present question must have reference only to the act of parlia-

(*a*) 1 T.R. 151, (*b*) 6 T.R. 242.

ment under consideration. Whatever observations therefore may arise, as to the hardship of the plaintiff's case, cannot be taken into the account in deciding this question; but even such arguments would be of little avail, because the plaintiff himself might have gone to *Bath* to prove his own case, and therefore he could not labour under the same difficulty to which he would be subject in the superior Courts of *Westminster* Hall, where he could not be a witness in his own cause. This question turns upon three clauses of the act: the first, twelfth, and twenty-second. The simple question is, whether this was a debt recoverable under the last mentioned clause within this jurisdiction. By that clause it is provided, "that any debt or debts due to any person, whether such person shall reside within the jurisdiction of the said Court or not, shall be recoverable against any debtor resident within the said jurisdiction." Upon this clause therefore the whole case depends. As to the observation founded upon *s.* 43, by which a power is given to the inferior Court to summon witnesses resident only within the jurisdiction, such observation can have no weight in the case, because the same objection would arise even in cases before the superior Courts, if a witness chose to remove out of the reach of their process. This Court has no power to compel the attendance of a witness residing out of its jurisdiction, and therefore the objection relied upon would apply with equal weight to the jurisdiction of every Court in the kingdom, whether local or general.

ABBOTT Ch. J. We cannot look to the policy of acts of parliament of this description, or to the motives of the legislature for their enactment; nor can we attend to the particular inconveniences that may arise in the course of their operation. We must give effect to the plain language of the legislature, according to

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the fair interpretation of the words of the act. It seems to me, that the language of the 16th section is too large to admit of any doubt. It puts the jurisdiction of the commissioners upon the *residence* of the *defendant*, where the sum to be recovered does not exceed 10*l*. By this section, the commissioners are entitled to decide between party and party, in all these enumerated causes, where the amount does not exceed 10*l*. Then comes the 22d section, which enacts, "That from and after the meeting of the said commissioners, it shall and may be lawful to and for any person or persons (whether such person or persons shall reside within the jurisdiction of the said Court or not), having any debt or debts on the balance of account or otherwise howsoever, not exceeding the value of 10*l*. due or owing, or belonging to him, her, or them, in his, her, or their own right, or in the right of any other person or persons, or as executor or administrators, guardian, assignee, or trustee to any person or persons, or due or owing to him as chamberlain, town-clerk, or other officer to any body corporate, or collector of any rates or taxes, or as clerk or other officer to any commissioners, or to any club or friendly society duly associated and constituted by the statutes in that case made and provided, or in any other manner whatsoever, inhabiting, residing, or being within the said city, or the liberty or precincts thereof, or within either of the several parishes, &c. as aforesaid, to apply to the clerk of the Court for the time being, &c." This clause first limits the jurisdiction to 10*l*.; and next it provides, that any person, whether residing or not within the jurisdiction, may cause a person residing within the jurisdiction to appear to a summons of the Court to answer his plaint or suit; and then follows the prohibitory clause, namely, the 47th, which declares, that the party who sues in the Courts of *Westminster* Hall for a debt which he might have recovered in that Court, shall not be en-

titled to his costs. It is impossible for us, without adopting too narrow an interpretation of the words of the act, to say that this plaintiff might not have sued the defendant in the Court of Requests below; and if he might, I think he is not entitled to costs. It might be very fit for the legislature to consider whether the prohibitory clause ought not to contain some proviso, declaring that it was not to be held to extend to the case of a plaintiff who should reside beyond the limits of the jurisdiction. That however not being done, we are bound by the language of the statute to say, that this was a debt which might have been recovered at *Bath*, and consequently that the plaintiff is not entitled to costs.

BAYLEY J. If this was a common law Court which had sought to extend its cognizance to subjects of a new jurisdiction, I think the common law principle would apply, and consequently they could not extend it to any debt not arising within the jurisdiction. This however is a Court of Requests, constituted by a special act of parliament; and looking to the 22d section, it appears to me that the true construction of the act is, that it extends to all debts under 10*l.* wherever contracted, provided they are owing from parties resident within the limits of the commissioners' jurisdiction.

HOLROYD J. I am of the same opinion. If it was the intention of the legislature to limit the jurisdiction of this Court to causes of action arising exclusively within the city of *Bath* and its precincts, I think they would have used words to carry that intention into effect. Having however given a jurisdiction to the commissioners over every cause of action, provided the debtor is resident within the city or its precincts, without confining it merely to causes of action arising within the jurisdiction; we are bound to give effect to

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the general words, unless we could see from other sections of the act of parliament something to restrain the jurisdiction, and to shew that it was the intention of the legislature to restrain the operation of the general clause. There are, however, no other clauses restraining the intention of the legislature, and I think we are bound to give effect to the intention as we find it expressed.

BEST J. It may be extremely inconvenient for a creditor, residing at a distance from *Bath*, to go to that city for the purpose of suing a defendant there residing; but that is a matter not for us to decide; for it appears to me, that the legislature has declared, that if the defendant be resident in *Bath*, wherever the cause of action arises the plaintiff is bound to proceed against him in *Bath*, if the debt be under 10*l*. Wherever the plaintiff resides, has nothing to do with this question; for if the defendant resides in *Bath*, and the debt be under 10*l*. he is unquestionably entitled to be sued in that city. That may be attended with considerable inconvenience to the plaintiff, but it is an inconvenience which can only be remedied by the legislature. We should not be construing the act of parliament, but legislating, if we gave it a different construction. The objection suggested, that this inferior jurisdiction has no power to compel the attendance of witnesses residing out of its jurisdiction, is an objection equally applicable to every Court in the kingdom, where such Court has no power to enforce the attendance of witnesses. The debt here follows the person, and I think we are bound to decide in conformity with the policy of the act, the object of which was, to restrain parties from bringing actions in Courts, where the costs must exceed the amount of the debt.

Rule absolute.

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REX *against* THE SHERIFF OF DEVON.

The Court allowed 5 days' time to the Sheriff to make his return to a *fieri facias*, on a suggestion of a difficulty occasioned by a writ of extent having been afterwards issued at the suit of the Crown; but the rule for further time was granted on payment of costs. (*a*)

BAYLEY on a former day obtained a rule to shew cause why the Sheriff of *Devon* should not be allowed five days to make his return to a *fi. fa.* issued out of this Court on the 26th of *July* last, on the ground that a writ of extent had been delivered to him out of the Court of Exchequer, to levy upon the defendant's goods in satisfaction of a Crown debt; and as that writ was entitled to priority, he was not yet in a condition to make a return to the *fi. fa.*

(*a*) In *Wells* v. *Pickman*, 7 T. R. 174, the Court, upon the application of the sheriff, enlarged the time for his making a return to a writ of *fieri facias*, upon a suggestion of a reasonable doubt, whether the goods seized under the writ were not bound by an *extendi facias*, afterwards issued at the suit of the Crown for malt duties, for the purpose of inducing the plaintiff to resort to the Court of Exchequer, to try the right to take the property in execution. *Thurston* v. *Thurston*, 1 *Taunt.* 120. So in the case of *King* v. *Bridges*, 7 *Taunt.* 294, the Court of C. P. staid the proceedings in an action brought by the assignees of a bankrupt against the sheriff, for taking goods in execution after notice of the bankruptcy, until the sheriff was indemnified to the satisfaction of the prothonotary. 7 *Taunt.* 294. And the same doctrine as to the propriety of protecting the sheriff, by granting him time to return the writ, &c. where the right to the goods is contested between two parties, is laid down, 1 Sir *W. Bla.* Rep. 205-6; *Shaw* v. *Tunbridge*, 2 Sir *W. Bla.* Rep. 1064; *Raines* v. *Nelson*, *id.* 1181; 3 *Campb.* 348, 523; 1 *Stark.* 45, *Barnard* v. *Leigh*; *Tidd*, 6th ed. 1065. So where it appeared by affidavit, that a writ of extent and a *fieri facias* had been issued on the same day, the Court refused to allow a *venditioni exponas* to be issued, to compel the sheriff to sell the goods under the *venditioni exponas*. *Anon. Hil.* T. *Jan.* 11, 1815. *Peake* moved for a rule to shew cause why a writ of *venditioni exponas* should not be issued, to compel the sheriff to sell the goods under a *fieri facias*. It appeared that a writ of extent had been issued against the goods of the defendant, tested on the same day as the *fieri facias*. Lord *Ellenborough* Ch. J. Should not this application be made to the Court of Exchequer? The Court of Revenue is the proper Court. *Exparte Calvert*, cited in *exparte Wilson*, 1 *Anst.* 269. And *per Le Blanc* J, if we ordered a *venditioni exponas*, the sheriff would be directed to pay the money into the Exchequer. *Bayley* J. Such an application as this was refused by the Court of Common Pleas, in *Thurston* v. *Thurston*, 1 *Taunt.* 120. *Per* Lord *Ellenborough*, Ch. J. With respect also to the merits, this point was much considered; and we gave our opinion at much length in *Thurston's* case, 16 *East*, 254, which must be still in recollection of many. Rule refused.

Where a writ of extent, and a *fi. fa.* were issued against the goods of the defendant tested on the same day, the Court of K. B. refused to grant a writ of *venditioni exponas* on the return to the *fi. fa.*

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A. Moore now shewed cause against the rule, upon an affidavit stating that the Sheriff had notice on the 6th of *October* from the plaintiff's attorney, that the plaintiff would expect the money levied under the *fi. fa.* by the first day of this Term; and that if he neglected so to do, it would be at his peril. He contended, that under these circumstances the Sheriff was entitled to no indulgence, having had the whole of the long vacation to make his return and advise upon the course it would be proper for him to pursue, without prejudice to the proceedings under the extent. In all events this indulgence must be upon payment of costs.

The COURT said, that such applications ought not to be encouraged, as they tended to delay justice; but as there might be some difficulty in making the return for the cause assigned, it was not unreasonable to enlarge the time until *Monday* next. It must be however upon payment of costs.

Rule absolute, on payment of costs.

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KINGSTON *against* HAYCHURCH.

The Court will not grant a rule for setting aside an inquisition after judgment by default, on the ground, that the under-sheriff directed the jury to consider the poverty of the defendant in mitigation of damages. (*a*)

ACTION for words, "that the plaintiff had burnt her own child." The defendant having suffered judgment to go by default, damages were assessed

Suffering judgment by default in an ac-

(*a*) But the Court will set aside their inquisition, if the sheriff has misdirected the jury in point of law. A judgment by default, in an action for use and occupation, amounts to an admission that the defendant occupied a house under the plaintiff, who need not prove that it was his own house; and if the defendant were to insist that he did not occupy the particular house to which the evidence has been directed, but some other, he must prove the fact. And in *Davis* v. *Holdship*, *East.* T. 1814, *May* 20th, *Scarlet* shewed cause against a rule obtained by *Denman*, to set aside the inquisition returned on a writ of enquiry, in an action for use and occupation.

upon a writ of inquiry before the sheriff's deputy,

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KINGSTON *against* HAYCHURCH.

tion for use and occupation, amounts to an admission that the defendant held a house of the plaintiff, who need not shew that it was his house, and it lies upon the defendant to prove that he did not occupy the particular house to which the attention of the jury has been directed: on setting aside a verdict for a misdirection of the sheriff, the defendant will not be allowed costs.

The rule had been obtained on the ground of the misdirection of the sheriff, who held, that the plaintiff was bound to prove that the house, for the rent of which the action was brought, belonged to him. It was contended in support of the rule for setting aside the inquisition, that such evidence was unnecessary, and that the attention of the jury ought only to have been directed to the amount of the damages which the plaintiff had sustained. Lord *Ellenborough* Ch. J. The defendant has admitted upon the record, that he occupied a house under the plaintiff, and if the action is only brought for a sum due for the occupation of one house, the burden is thrown upon the defendant of proving that he did not occupy this house, or that he occupied another. *Scarlet* then said, that the rule ought only to be made absolute upon payment of costs. But, *per* Lord *Ellenborough* Ch. J. The defendant cannot be allowed costs in the case of a misdirection of the sheriff. *Per Curiam.* Rule absolute, but not with costs. And see other instances, where the inquisition has been set aside for a mistake in law, *Woodford* v. *Eades*, 1 *Stra.* 425; *Parr* v. *Purbeck*, 8 *Mod.* 196, *Tidd*, 6th ed. 611. The Court will not interfere on behalf of the plaintiff to set aside the inquisition, where the plaintiff has not got a verdict for his full demand, on the ground of his having given no evidence in respect of part of it; nor will the plaintiff be allowed to enter a *nolle prosequi* as to that part; but if any particular sum demanded was not presented to the attention of the jury, the plaintiff may recover it in another action. *Anon. East.* T. 1815, *May* 8th. *Gaselee* shewed cause against a rule obtained by *Walton* on behalf of the plaintiff, to set aside an inquisition which was in the plaintiff's favour, on payment of costs. It appeared that the action was for a bill of exchange, and for duties of wines, &c. the plaintiff not being able to prove his claim for the duties, took a verdict only for the amount of the bill of exchange. *Walton* contended, that the duties were withdrawn from the consideration of the jury, but that fact did not appear in the affidavit. *Dampier* J. If the demand was withdrawn altogether from the consideration of the jury, there is a case of *Seddon* v. *Tutop*, 6 T. R. 607, which renders this application to the Court unnecessary. Lord *Ellenborough* Ch. J. We should be very glad if we could, to aid the justice of the case; but a writ of enquiry is the same as any other trial, and it would be a dangerous precedent to prevent any party, who has tried his chance at a trial, but has not brought forward all the evidence which upon consideration he is able to do, to permit him to go to trial again. *Walton* then prayed that the Court would allow him to enter a *nolle prosequi* to all the counts but the first, or make the defendant undertake not to plead the judgment in bar to any further action *Sed per Curiam.* It cannot be done. *Dampier* J. The course would be for the defendant to plead this judgment in answer to any future action, and you will reply that it was not the same identical consideration, and then the question would come fairly in issue. On *Gaselee's* throwing out an intimation of some accommodation, the Court strongly recommended it; and see further as to the point agitated in this case, besides the authority cited. *Gulliver* v. *Drinkwater*, 2 T. R. 261.

The Court will not set aside an inquisition, on behalf of the plaintiff, when he has not obtained a verdict for his full demand, though no evidence is given on one part of the demand, nor will the plaintiff be permitted to enter a *noli prosequi* as to that part.

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Kingston *against* Haychurch.

when the jury gave the plaintiff 20*s*. which not being sufficient to carry costs under the statute,

Adolphus now moved to set aside the inquisition returned on a writ of inquiry and damages awarded, on the ground that the under-sheriff had desired the jury, in estimating the damages, to take into consideration the circumstance that the defendant would have to pay her own costs, and that she was a person in very moderate circumstances.

Holroyd J. said he thought this was not a sufficient ground for setting aside the inquisition, inasmuch as he was not aware that the under-sheriff's direction to the jury was contrary to law.

Rule refused.

Monday, Nov. 22d.

Ex-parte ———

Where an attorney applied to be re-admitted, after omitting to take out his certificate for two years, it was held, that in order to admit him without payment of arrears of duty, he must swear distinctly, that he has not practised in the interval. (*a*)

COWLEY moved to re-admit an attorney of this Court upon paying a small fine, upon an affidavit, that for two years last past he had omitted to take out his certificate, in consequence of ill health and embarrassed circumstances; but the affidavit did not state, that during that time he had not practised in this Court.

The Court said, that in order to exempt the gentleman from the payment of the arrears of duty, he must positively state, that during the interval he had not practised in this Court. Otherwise he must pay the arrears, and a fine of twenty shillings.

Cowley took his rule upon these terms.

(*a*) *Vide Anon. ante*, 163; *Exparte Bartlett, ante*, 207; *Anon. ante*, 557, note; *Exparte Frost, ante*, 558, and other cases, *ib.*

1819.

Monday, Nov. 22d.

WILSON *against* HUNT.

A Judge's order for the delivery of a bill of particulars does not stay proceedings, unless it is drawn up and served upon the plaintiff's attorney. (a)

PLATT on a former day moved to set aside the interlocutory judgment signed in this case for irregularity, the alleged irregularity being, that judgment was signed before the time for pleading had expired.

Andrews now shewed cause, and said that the single question was, whether a Judge's order on summons for the delivery of a bill of particulars, which order was not drawn up nor served upon the plaintiff's attorney, operated as a stay of proceedings. The facts were, that the defendant's attorney took out a summons for the plaintiff's attorney to deliver a bill of particulars,

(a) So in *Sedgewick* v. *Allerton*, 7 *East*, 542, it was held, that the plaintiff is not bound to notice an order for time to plead, obtained by the defendant, unless the order is drawn up and served, for otherwise a door would be opened to mistakes and perjury, with respect to the terms upon which the order was granted; and judgment may consequently be signed as for want of a plea, as if no such order had been obtained. So the consent indorsed on a Judge's summons for changing the *venue*, &c. binds neither party, unless the order be regularly drawn up and served in pursuance thereof. *Joddrel* v. ———, 4 *Taunt*. 253. So in pleading, the plea must be delivered or filed at length; and the delivery of a paper, with the words General Issue upon it, &c. is not a sufficient plea to prevent the plaintiff from signing judgment. *Gibson* v. *Houseman*. *East*. T. 1816, *May* 22d. *Polloch F.* moved to set aside a judgment, signed as for want of a plea. The plea delivered was not written out at length, but only contained the words "the general issue," though it was on the proper stamp. It was brought back to the defendant's attorney by the clerk of the plaintiff's attorney, who said he objected to it on the ground that there were many general issues, and this plea did not shew what the general issue was which he meant to plead; on which the defendant's attorney added the words "*non assumpsit*," and the plaintiff's clerk carried it away. He contended, that this was an acceptance of the plea, and plaintiff should not have signed judgment after it. And that, this plea was the same as the usual entry in the general issue book. *Sed per Bayley* J. That is not sufficient; the acceptance was only by the clerk; you cannot have the rule without an affidavit of the merits. Rule refused.

A plea being merely the "general issue *non assumpsit*," is a mere nullity, and judgment signed for want of a plea, will not be set aside without an affidavit of the merits, though the plea was accepted by the plaintiff's clerk.

See also *Barnes*. q. t. v. *Skinner*, in which a similar note was held to be no plea; and it was said, that pleas delivered to attornies must be drawn up in the same manner as when they are to be left in the office. *Barnes*, 239; see also *Hartop* v. *Juckes*, MSS. T. 53 *G*. 31. 1. *M*. & *S*. 709.

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WILSON *against* HUNT.

and the Judge, at chambers, directed that an order should issue for that purpose; but the affidavits upon which this motion was made, did not state that the order was in point of fact drawn up, nor that it was served upon the plaintiff's attorney.

The COURT said, that the mere drawing up of the order, supposing that fact to have been established in this case, would not operate as a stay of proceedings, unless it was actually served upon the plaintiff's attorney. Here it did not only appear doubtful whether the order was served, but whether it had ever been, in point of fact, drawn up. The affidavits in support of the motion should have removed all doubt upon these points, in order to give the defendant the benefit of it.

Rule discharged.

Monday, Nov. 22d.

ELSTONE *against* MORTLAKE.

Affidavit to hold to bail, stating that defendant was indebted to plaintiff on a bill of exchange, payable to a third person at a day now past, held sufficient, without stating at what day the bill was payable, and without shewing the connexion between the payee and the plaintiff. (a)

E. LAWES moved to set aside the bail bond in this case, on the ground of the insufficiency of the affidavit to hold to bail. The action was brought upon a bill of exchange, drawn upon and accepted by the defendant; and the affidavit to hold to bail, after stating these circumstances, went on to state, that the bill was payable at "*Hammonds* and Co." at a certain day now passed. He submitted, that the affidavit should have stated in terms what the day was. Another objection was, that upon the affidavit, the bill appeared to be drawn payable to a third person, without shewing that the plaintiff had any connection with it.

BEST J. held the affidavit to hold to bail quite suf-

(a) See other cases, *Chitty* on Bills, 5th ed. 446, 7, 8; but an affidavit of debt against the acceptor of a bill of exchange, without stating that it was payable at a day past, or otherwise showing that it is due, is insufficient.

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ELSTONE *against* MORTLAKE.

ficient; for, as to the first objection, if in point of fact the bill was payable on a certain day now past, the statement in the affidavit was sufficient; and as to the second objection, it sufficed that the plaintiff swore that the defendant was indebted to him, for if he were not so, the defendant might indict him for perjury.

Rule refused.

THE KING *against* THE JUSTICES OF WORCESTERSHIRE.

Monday, Nov. 22d.

A *Mandamus* will not lie to justices in Quarter Sessions to compel them to review their decision on an appeal, upon the ground that the adjudication was not warranted by the evidence.(*a*)

W. E. TAUNTON moved for a rule to shew cause why a writ of *mandamus* should not be issued, directed to the Justices of *Worcestershire*, commanding them to review certain evidence submitted to them in Quarter Sessions, in a matter of appeal, on the ground that the conclusion drawn by the magistrates was not warranted by the facts proved.

The COURT however said, that no *mandamus* would lie for any such purpose; the Court of Quarter Sessions were the only judges of the effect of evidence laid before them, and if they drew a wrong conclusion from it, this Court had no power to compel them to review their decision. In certain cases a *mandamus* might lie to the Sessions to admit evidence which had been rejected, but it was never heard of that this Court would interfere with their province of deciding upon the evidence.

Rule refused.(*b*)

(*a*) *Vide* the *King* against the *Justices* of *Devon*, *ante*, 34; the *King* v. the *Justices* of ———, *ante*, 161; *Willett* v. *Sparrow*, 6 *Taunt*. 576.

(*b*) *Abbott* Ch. J. was absent at Guildhall.

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Monday, Nov. 22d.

THE KING *against* THE TREASURER OF THE COUNTY OF SURREY.

Where the treasurer of the county of *Surrey* refused to pay the expenses of a witness in a case of felony, pursuant to an order from the borough of *Southwark* Sessions, under the 58 *G.* 3, *c.* 70, the proper remedy was held to be by indictment, or by an attachment in the inferior Court, and not by *mandamus.* (*a*)

PRINCEP moved for a rule to shew cause why a *mandamus* should not issue to the treasurer of the county of *Surrey*, commanding him to pay the sum of five

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An affidavit of the service of the master's *allocatur* on the taxation of costs of a prosecution against a parish, in order to ground a motion for an attachment against those on whom it was served, must state that they are the same persons as were defendants in the prosecution.

(*a*) See as to the remedy for costs in cases of this nature, 1 *Chitty's* Crim. Law, 825-6, 827-8. An affidavit of the service of the master's *allocatur* on the taxation of the costs of a prosecution against a parish, in order to ground an attachment against those on whom it was served, must state, that they are the same persons as were defendants in the prosecution. *Rex* v. *Inhabitants* of *Kendal. Trin.* T. 1816, *July* 3d. *Maule* moved for an attachment against two inhabitants of the parish of *Kendal*, for not paying costs pursuant to the master's *allocatur*, on an affidavit stating generally a demand and refusal. *Abbott* J. By whom was the demand made? It was by the person who swore that he was the attorney for the prosecution. By statute 5 *W.* & *M. c.* 11, *s.* 3, it is enacted, that if the defendant, prosecuting such writ of *certiorari*, be convicted of the offence for which he was indicted, the Court of K. B. shall give reasonable costs to the prosecutor, if he be the party grieved, or a justice of the peace, overseer, or other civil officer (the *King* v. The Inhabitants of *Taunton, St. Mary*, 3 *M.* & *S.* 465), prosecuting on account of the fact committed or done, which it concerned him as officer to prosecute or present. And it was enacted, that the costs should be taxed according to the course of the Court; and that the prosecutor, for the recovery of them should, within 10 days after a demand made of the defendant and refusal of payment, and after an affidavit made of the circumstances, have an attachment *against the defendant* for his contempt; and the recognizance is not to be discharged until the taxed costs are paid. *Abbott* J. It seems therefore that the demand ought to be made on the identical persons against whom the prosecution was instituted. And the learned Judge, being then alone in Court, hesitated to grant the rule, as he said that it must be absolute in the first instance; and he observed, that he could not grant an attachment without a perfect affidavit. The matter was mentioned again when *the Court* was full, and they thought, upon considering the statute, that the demand must be sworn to have been on the same parties as were defendants in the prosecution, otherwise the party who made the present application might have fastened on any person that he first encountered in the parish, and who might have no notice at all of the *allocatur*. The Court therefore said, that this motion was not sustainable, and desired it to be remembered, that no motion could take place before ten days after the demand. *Per Curiam.* Rule refused.

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THE KING *against* THE TREASURER OF THE COUNTY OF SURREY.

shillings to one *Kinsey*, pursuant to an order of the Borough Court of Sessions for the Borough, as an allowance for his expenses as a witness, in attending a prosecution for felony, in the said Court. This application was founded on the 58 *Geo.* 3, *c.* 70, passed for abolishing parliamentary rewards in certain cases. The affidavit stated, that the Borough Sessions having ordered the sum of five shillings to be paid to *Kinsey*, he took an an order, signed by the clerk of the peace for that sum to the county treasurer, who after repeated applications refused to pay the same.

The COURT said, that they could not interfere by *mandamus*. The proper remedy was either by attachment against the treasurer in the Borough Court, or by indictment at common law for disobeying the order. This latter remedy was the most proper, and they referred to *Rex* v. *Johnson*, (*a*) as a case in point.

Rule refused.

(*a*) 4 *M.* & *S.* 51[illegible]

In Re WILLIAM JONES.

Monday, Nov. 23d.

The Court will not interfere on motion against an attorney for negligence in the discharge of his professional duty, if there be no fraud; and therefore where an attorney, who was retained to defend an action, allowed judgment to go by default, and afterwards desired his client not to attend to [illegible] to [illegible] the damages, because the proceedings might be set aside for irregularity, when in fact they could not; and in the event execution was sued out, and the client paid the [illegible] damages and costs, Held, that the only remedy against the attorney was by action.(*a*)

CHITTY moved for a rule to shew cause why an attorney of the Court should not pay 35*l.* 15*s.* being the debt and costs in an action brought against the

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(*a*) In *Floyd* v. *Hough*, 3 *Atk.* 56[illegible], it is reported to have been held, that where a solicitor in equity has been negligent in the management of his client's business, that Court may grant an attachment against him. And Lord *Hardwicke* said, a client to be sure may have an action against a solicitor for neglect in the managing his business, and courts of law have now exercised a summary jurisdiction by attachment over attornies, which they have done very rightly, as it is a much speedier remedy, and there is no doubt, said he, that a court of equity has the same power over solicitors; but his lordship said that there was not sufficient materials before

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IN RE JONES.

applicant *Jones*, and which he had been obliged to pay in consequence of the alleged negligence of the defendant. The circumstances of the case, as they appeared from the affidavits, were as follows. *Jones* having been served with a copy of a writ, at the suit of a person to whom, it was sworn, he was not in any manner indebted, employed the attorney against whom this motion was made, to appear and defend the action. This gentleman accordingly being apprised of the nature of the defence, undertook the defence, and engaged to proceed to trial; but instead of doing so he suffered judgment to go by default, and afterwards dissuaded his client from attending on the execution of the writ of inquiry, assuring him that the proceedings might be set aside on the ground of irregularity. Eventually, however, no motion was made for the purpose of setting aside the proceedings, and a *fieri facias* was sued out against *Jones*, who was compelled to pay the supposed debt and costs to prevent his goods from being taken in execution. The affidavits also stated that *Jones* had never countermanded the retainer, that he repeatedly urged his attorney to defend the action, and informed him that he would proceed at any cost; that the attorney never applied for money, nor gave any other reason for the course which he had adopted.

Chitty in support of the rule, referred to *Rex* v. *Tew*, *Sayer's* Rep. 50, in which, upon a rule to shew

him to enable him to ascertain the *quantum* of satisfaction which the attorney ought to make in this particular instance. And see *Fawkes* v. *Pratt*, 1 *Peere Wms.* 593; *Walmsley* v. *Booth*, 2 *Atk.* 27; *Phillips* v. *Phillips*, 3 *Atk.* 391. And see *De Roufigny* v. *Peale*, 3 *Taunt.* 484; *Rolfe* v. *Rogers*, 4 *Taunt.* 191; *Clarke* v. *Gorman*, 3 *Taunt.* 492; *Tidd*, 6th ed. 78. An attorney of either bench accepting a warrant, or subscribing a process, declaration, or warrant to appear, is compellable by a particular rule of Court to cause an appearance to be entered, and in default thereof is liable to an attachment or to be put out of the roll, as the case requires, and the party is not to be received to countermand such appearance after his retainer. Rule K. B. in 1654. And see *Sedgworth* v. *Spicer*, 4 *East*, 568; *Gruggen* v. *White*, 4 *Taunt.* 881; *Bac.* Abr. Attorney. H.

cause why an attachment should not be awarded against the defendant, it appeared that *Tew*, who was an attorney, had received sixteen pounds from his client who was a plaintiff in a cause, but that after giving notice of trial he had neglected to fee counsel, or to attend the trial of the cause, and that in consequence of this neglect, his client was nonsuited and afterwards thrown into gaol. The Court made the rule absolute. He referred also to *Rex* v. *Bennet*, (*a*) in which the Court granted a rule to compel an attorney to pay the debt and costs to his client, on the ground that he had discharged the defendant on taking a security which he knew to be worth nothing; and to *Collins* v. *Griffin*, (*b*) in which the Court was moved against the defendant's attorney for not acquainting the defendant that he had received notice of trial, whereby the plaintiff obtained a verdict without defence. It appeared, upon shewing cause, that the omission was entirely owing to the neglect of the agent of the defendant's attorney. But the Court held that that was no defence for him; that the attorney was answerable to the client, the agent to the attorney, that the party ought not to be put to his action, but that the matter should be determined in a summary way. The Court therefore granted the attachment. It was submitted that these decisions furnished a sufficient authority for proceeding against the attorney by a summary application; and the grossness of the neglect of which he had been guilty, and the inadequacy of any other remedy by action to answer the purposes of justice, were pressed upon the Court in support of this motion. *Sed per*

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BEST J. The cases referred to are insufficient to

(*a*) *Sayer*, 169.

(*b*) *Barnes*, 37; and see *Rex* v. *Fielding*, 2 *Bur.* 654, also cited in support of the rule.

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sustain the present application, and there is no instance of the kind within my knowledge. The present charge against the attorney is that of mere negligence, which can only be the subject of an action. Had fraud been imputed, it might be the foundation of this proceeding; but the case now laid before the Court is not one in which it can interfere upon motion.

Rule refused.

Monday, Nov. 23d.

The KING *against* JOHN MIDDLETON.

The Court will not grant a *habeas corpus* to bring up the body of a feme covert, on an affidavit, that she is desirous of disposing of her separate property, and that her husband will not admit the necessary parties to see her, and that she is confined by illness, and not likely to live long; nor will they under such circumstances grant a rule to shew cause why the necessary parties should not be admitted to see her; for if there be no restraint of personal liberty, the matter is only cognisable in a court of equity. (*a*)

TINDAL moved for a writ of *habeas corpus* to bring up the body of *Mary* the wife of *John Middleton*, or for a rule to shew cause why certain persons named in the affidavits should not have free access to the said *Mary*, at all proper and seasonable times, for the purpose of consulting with and advising her touching the disposal of certain separate property, of which she was possessed by virtue of her marriage settlement. The affidavits upon which the motion was made stated in substance, that in the month of *September* 1815, a marriage settlement was executed previous to the marriage of Mr. and Mrs. *Middleton*, by which certain separate property belonging to the latter was vested in her and to her separate use, with power of executing a trust deed in pursuance of the settlement; that the marriage accordingly took place in that month, and that from that time to the present, the parties had lived together very unhappily; that

A *habeas corpus* will not lie to bring up an apprentice to be discharged.

(*a*) Vide *Atwood* v. *Atwood*, 1 *Prec.* Cha. 492; *Bridgman's* Index, tit. Baron and Feme, 9 sec. 281, &c.; 13 *East*, 195. The only ground of applying for a *habeas corpus* is, that some restraint is put on the personal liberty of the party. *Anon. Trin.* T. 1814, *June* 14th. *Gurney* moved for a *habeas corpus* to bring up an apprentice to be discharged. *Sed per Le Blanc* J. It is not a case for a *habeas corpus*. The personal liberty of the apprentice is not restrained. *Per. Cur.* Rule refused. See also as to the *habeas corpus* for bringing up an apprentice, *Rex* v. *Reynolds*, 6 T. R. 497. *Ex-parte Lansdown*, 5 *East*, 58; *Rex* v. *Edwards*, 7 T. R. 745.

Mrs. *Middleton* was now extremely ill and not likely to live long; that she was desirous, as the deponent was informed and verily believed, of executing a power of appointment of trustees to dispose of her said separate property to her own use; that in pursuance of her wish so expressed, an attorney of this Court attended at the house of the said *John Middleton*, on the 18th day of this instant month of *November*, together with the necessary witnesses for the purpose of procuring the signature of and execution of the same by the said *Mary Middleton*, when the said *John Middleton* refused access to the said *Mary*, and desired the said attorney to walk out of the house. In addition to this statement there was an affidavit of a surgeon, who deposed, that during the last six weeks he had attended the said *Mary*, and that she was now in a dangerous state of health, too ill to be removed, and not likely to live a month. In support of the motion, the cases of *The King* v. *Wright and others* (*a*) and *The King* v. *Turlington*, (*b*) were referred to.

ABBOTT Ch. J. I am of opinion that we cannot grant either part of this alternative motion. With respect to the first, we cannot grant a *habeas corpus*, unless there distinctly appears to be some improper restraint on the personal liberty of the party desired to be brought up. Now it is sworn that this lady is in such a state of health that it would be impossible to remove her, even supposing it to be satisfactorily made out, that she is under personal duress. No good therefore could be attained by granting a *habeas corpus* in the first instance. The utmost we could do in all events, under these circumstances, would be, to grant a rule to shew cause why a *habeas corpus* should not issue; but I am extremely doubtful whether this Court

(*a*) 2 *Burr.* 1099. (*b*) *Id.* 1115.

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Rex *against* Middleton.

can interpose in a case of this description. It appears to me that the more proper course of proceeding would be, to apply to the Court of Chancery. The cases cited from *Burrow*'s Rep., do not seem to authorise this part of the motion. The first, namely, the *King* v. *Wright* and Others, was a motion for a criminal information against the defendants for having, as was alleged, used improper means of influencing a female, named *Savage*, to make a will, and the Court refused an *habeas corpus*, because she was too infirm and weak to be brought into Court. The second case was that where the Court granted a *habeas corpus* to bring up the body of a female who was improperly confined in a mad house at the instance of her husband. With respect to the alternative part of the motion now submitted to the Court, it does not appear to me, that either of those cases is an authority for this purpose; and I know no instance of this description in which this Court has made an order for the admission of persons under the circumstances stated, for the purpose stated, or for any other purpose, to a person who happens to be in a weak state of health, and under alleged improper confinement. It appears to me, that this also is more properly a subject for the consideration of a court of equity. I am extremely unwilling that we should take upon ourselves to exercise a jurisdiction which the law does not vest in us, and without some precedent for it I think we ought not to interpose in this manner, because it is impossible for us to know to what extent we may not be required to exercise such an authority. Where the liberty of the person is restrained, there we interpose by *habeas corpus*; and if in this case it had been satisfactorily proved to us that this lady's personal liberty was restrained, we should have had no discretion to exercise upon the subject, and should grant a writ at once.

BAYLEY J. I am of the same opinion. We cannot grant a writ of *habeas corpus* to do any more than remove that degree of restraint upon the person, which the law considers to be illegal. In this case a foundation must be laid to satisfy us that the husband is exercising an illegal restraint upon the person of his wife. For any thing that at present appears, he is only desirous of preventing any communication which may aggravate her present dangerous state of health. In all events, it appears that no good purpose can be answered by granting a *habeas corpus*, because she appears to be in a state of health which renders her unfit to be removed. In my opinion, neither of the cases cited is an authority for this motion. If this lady is prevented from disposing of her separate property, a court of equity is the proper tribunal for redress, and that court will enable her to dispose of her property as she thinks proper. The Court is in this difficulty, that they have an alternative motion presented for their consideration. It is clear that they cannot grant a *habeas corpus*, and then they are called upon to grant a rule to shew cause why certain persons should not have access to this lady. That is quite a novel application; and I know of no instance in which it has been complied with by this Court. It may be said, perhaps, that a similar occasion never occurred. The reason of that probably is, that this subject has been always considered to be one which peculiarly belongs to a court of equity.

HOLROYD J. This is not a case in which this Court would be justified in granting a *habeas corpus*, for it does not appear that this lady is under such restraint as would prevent her from exercising her personal liberty if she were in a fit state of health so to do. On the contrary, it appears that she is confined solely by ill health. Then if there be no illegal restraint, how

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can we grant a *habeas corpus?* On the other hand, how can we grant a rule calling upon the husband to admit persons into his house, when he is not doing any thing illegal, though he refuses particular persons admission into his house, in order to do that which the wife has power to do by other means.

BEST J. concurred.

Rule refused.

Wednesday, Nov. 24th.

MERCER *against* SANBY.

There must be three notices of *justification* and two changes of bail, to entitle plaintiff to insist on deposit of costs of opposition before the bail justify. (*a*)

IN this case three notices of bail had been given, and two changes had taken place.

Ellis applied for the costs incurred by the plaintiff in inquiries after and opposing the bail; but it appearing that the first notice was not that the bail would justify themselves in open Court, but only that they had been put in,

BAYLEY J. said that the plaintiff could not in this

Costs of former opposition allowed where there had been three notices and two changes of bail.

(*a*) See *Tidd's* P. 6th ed. 270. In *Thompson* v. *Davis*, *Trin.* 56 *Geo.* 3. it was held, that costs will be allowed where there have been three notices and two changes of bail. *Casberd* opposed the justification of bail till the costs of prior oppositions had been paid. There were three notices and two changes of bail. *Abbott* J. referred to the master, who said that the practice was in favour of allowing the costs of former oppositions in a case like the present; and the defendant's attorney paid the money into the master's hands before the justification was allowed.

Costs of prior oppositions not allowed, though there had been three notices of justification, if one of the notices was of bail put in merely for the purpose of a render.

But the costs of prior oppositions are not allowed, although there have been three notices of justification, if one of the notices was merely of bail put in for the purpose of a render. *Wilson* v. *Kinerley*, *East.* T. 1808. *Espinasse* applied for costs before the bail were permitted to justify, on the ground of there having been three notices of justification: but it appearing that one was put in merely for the purpose of a render, *Grose* J. held it not to be within the rule to give costs. *Vide* the *King* v. *the Sheriff of Middlesex*, 1 *Taunt.* 57; *Mitchell* v. *Claridge*, 1 *Taunt.* 58.

case insist on the deposit of costs, the rule being to give costs only where there had been three notices of *justification*, and consequent trouble of enquiring after the sufficiency of the bail, and two changes.

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MERCER *against* SANBY.

GOULD *against* LOGETTE.

Wednesday, Nov. 24th.

Affidavit to hold to bail on a bill of exchange for 523*l.* 17*s.* 6*d.* Declaration on a bill for 523 *livres* 17 *sous* and 6 *deniers* sterling. Held, that there was no variance so as to entitle the defendant to be discharged on filing common bail, the meaning of the two expressions being the same. (*a*)

THIS was a rule calling on the plaintiff to shew cause why an *exoneretur* should not be entered on the bail piece, or why the bail bond should not be

(*b*) But the bail are discharged if the plaintiff declare for a different cause of action from that expressed in the affidavit; as where the affidavit to hold to bail is in *assumpsit*, and the plaintiff declares in *trover*. *Tetherington* v. *Golding*, 7 T. R. 80. and where an affidavit was made at the suit of an indorsee against the acceptor of a bill of exchange or order for 553*l.* 12*s.* and it appeared by the declaration that the money was payable out of a particular fund, the Court discharged the defendant on entering a common appearance. *Wilks* v. *Adcock*, 8 T. R. 27. The same principle is recognized in *Spalding* v. *Mure*, 6 T. R. 363. And see *Munroe* v. *Hone*, *ante*, 171; 2 *East*, 305; 3 *Wils.* 61; 6 T. R. 158; 2 *H. Bla.* 278; 2 *Bos.* & *Pul.* 358; *Tidd*, 6th ed. 283. And the Court of C. P. will stay the proceedings on the recognizance, if the plaintiff did not recover against the principal of the cause of action expressed in the affidavit to hold to bail. *Wheelwright* v. *Jutting*, 7 *Taunt.* 304; 1 *Moore*, 51; *Caswell* v. *Coare*, 2 *Taunt.* 107. The affidavit to hold to bail must also correspond with the writ; but a small difference will not be material, provided the identity continue. The principal object of this rule seems to be, that the connection may appear between the different parts of the proceedings, in order to facilitate a prosecution for perjury, and to preclude any opportunity of evasion.

——— v. *Rennolls*, *Hilary* T. 46 *Geo.* 3. *Park* moved for a rule calling upon the plaintiff to shew cause why the defendant should not be discharged out of custody, on the ground of a variance between the writ and affidavit to hold to bail. In the writ issued against the defendant he was called *Rennolls*, but in the affidavit the final *s* was omitted, and he

Variance between affidavit and writ in letters of defendant's name, as *Rennoll* for *Rennolls*, does not vitiate the affidavit. (*b*)

(*b*) See the next case, and *Anon. East.* T. 1815, *May* 8, *post*. The names do not appear to be *idem sonantia*. The *King* v. *Shakespeare*, 10 *East*, 83. And see *Bingham* v. *Dickie*, 5 *Taunt.* Rep. 814. But the principal light in which defects in the affidavit to hold to bail are to be regarded seems to be with reference to an indictment for perjury; and if the affidavit do not fairly afford an opportunity for evasion it would probably be deemed sufficient.

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delivered up to be cancelled, with costs, on the ground of a variance between the affidavit to hold to bail, and the declaration delivered. The affidavit to hold to bail stated that the defendant was indebted to the plaintiff on a bill of exchange accepted by him for the sum of 523*l.* 17*s.* 6*d.*, and the declaration described it as a bill of exchange for "Five hundred and twenty-three livres seventeen sous and six deniers, being of the value of 523*l.* 17*s.* 6*d.* sterling. (*a*)

Tindal shewed cause against the rule, and contended that this was no real variance between the declaration and the affidavit to hold to bail, the amount of the debt being the same in each, for livres, sous, and deniers, answered to pounds, shillings, and pence sterling. The word *livre* sterling answered to *pound* sterling; the word *sous* answered to *sols*, from *solidum*, and *deniers* answered to *denarii*, all of which denominations were recognized in the usual form of pleading. He had an affidavit of several

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was called *Rennoll.* It was insisted that this was a sufficient ground for discharging the defendant, and that the names were not ever *idem sonantia.* But the Court refused the rule, and said that the mistake of a letter in spelling the name was not a ground for discharging the defendant. —Rule refused.

Mis-spelling in final syllable of defendant's name, as by putting "rum," instead of "run," immaterial in affidavit to hold to bail. *Semb.* also, that it is sufficient to state that a notary public was sworn to interpret, without stating that he had actually interpreted.

Anonymous, Mich. T. 1813. *Nov.* 8. *Storks* moved for a rule to shew cause why the defendant should not be discharged out of custody on filing common bail, on the ground that the affidavit to hold to bail was insufficient in two respects. 1st. That the name of the defendant was written wrong in having the final syllable "rum" instead of "run." 2dly. That the jurat stated that a notary public had read over the affidavit to the plaintiff, and that the notary had been duly sworn to interpret; but it did not proceed to state that he had interpreted. In support of the first objection he cited the cases of *Binfield* v. *Maxwell,* 15 *East,* 159. where the Court only refused to discharge the defendant on the ground of the lateness of the application, the time allowed for pleading in abatement having expired. And for the second objection, he cited the rule of court 4 T. R. 284 (*a*); and *Tidd's* Prac. 6th ed. 520. *Le Blanc* J. expressed his opinion that neither of the objections was material, but permitted *Storks* to take a rule *nisi*, *Storks* at the same time doubting whether he should draw it up.

(*a*) Vide *Kearney* v. *King, ante,* 28.

persons, which stated that this was the invariable mode of drawing sterling money in *France*, and that in fact there was no other possible way of carrying on the commerce between that and this country.

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E. Lawes applied for time to file fresh affidavits in answer to those produced against the rule; but

The COURT refused, saying that there was no pretence for calling this a variance, because in substance and effect the value of the money described in the affidavit to hold to bail, and that set out in the declaration, was the same in both. The Court would intend that *livres*, as mentioned in the declaration, meant *livres* sterling; that *sols* or *sous* meant *solidum*, or shilling; and *denarii*, *deniers* or pence. There was therefore no such variance as to justify this motion.

Rule discharged with costs.

WOODBRIDGE *against* SPOONER & UX. *Executrix of* REBECCA BANCE.

Wednesday, Nov. 24th.

THE declaration stated, that *Rebecca Bance*, on the 1st of *January* 1816, in consideration that *Stephen Woodbridge* the plaintiff, at the special instance and request of the said *Rebecca*, would let

It is an inflexible rule, not to admit parol evidence to contradict a written instrument, unless the consideration be *illegal*. (*a*) Where a testator gave in her life time to the plaintiff a promissory note to pay him or order "on demand the sum of 100*l*. for value received and his kindness to me," with a verbal engagement on the part of the plaintiff that the note should not be demanded until after her death, it was held, in an action upon the note, that parol evidence could not be received to shew that it was not given for a valuable consideration. (*b*) And that such a note does not operate by way of testamentary disposition; nor is it void on the ground that it is a fraud on the legacy duty, that duty never having attached upon it; and there being nothing to shew that the amount passed by way of a *donatio causa mortis*. (*c*)

(*a*) See the rule and cases in *Phil.* on Evid. 4th ed. 488 to 498. *Chitty* on Bills, 5th ed. 61, 2.

(*b*) See *Williamson* v. *Losh*, and *Nash* v. *Brown*, *Chitty* on Bills, 5th ed. 93, n. 2.

(*c*) As to this point, see *Chitty* on Bills, 5th ed. 93, n. 2. and *Holt.* C. N. P. 21, and 10 to 13; *Bunn* v. *Markham*, 7 *Taunt.* 224; *Toller's* Executors, 232 to 237.

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her have the run of his house on *Sundays*, she undertook and faithfully promised him that she would at her decease give him a hundred pounds more than a legacy of twenty pounds which she meant to leave him and his wife by her will; that thereupon plaintiff afterwards and continually from and after the making of said promise and undertaking, and during the life and until the death of said *Rebecca*, did let her have the run of his house on *Sundays*; that the said *Rebecca* did not during her life pay any part of the said sum of 100*l.*; that on the 1st of *January* 1818 she died, having first made her last will and testament, and appointed the defendant *Jane*, the wife of *John Spooner*, executrix thereof; but without having left the plaintiff any sum of money over and above the said legacy of 20*l.* The first count of the declaration concluded with the proper averments. The second count stated that the said *Rebecca* on the 1st of *September* 1817, made her promissory note for payment on demand to plaintiff of 100*l.* and undertook and faithfully promised to pay the plaintiff the said sum of money, according to the tenor and effect of said note. There were the usual common counts. Plea the general issue, and issue joined.

At the trial before ABBOTT Ch. J. at the *Middlesex* Sittings in *Trinity* Term last, the case appeared to be this:—The plaintiff and *Rebecca Bance* the deceased, had known each other a great many years, both residing in the same town. The deceased was a widow woman living upon a limited income. She was in the habit of frequently visiting the plaintiff and his wife, and in consequence of the kindness and hospitality shewn her, she made her will in which she left the plaintiff a legacy of 20*l.* This event took place upon the occasion of her being attacked with alarming

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illness. On her recovery she resumed her visits, and on recommencing so to do she told the plaintiff "That if he would let her have the run of his house on *Sundays*, she would leave him 100*l.* in addition to the former legacy. The plaintiff acceded to this proposition, and she constantly while in health, and till within a few weeks of her death, had the run of his house on a *Sunday*, and upon an average two or three days in a week, living entirely at the cost of the plaintiff; and when her health prevented her coming in person, as she was somewhat infirm, the plaintiff invariably sent her meals to her own house; and this practice continued with very little interruption for the space of four years and a half. At length it became the subject of conversation between the plaintiff and the deceased, in what manner and to what extent the plaintiff should be remunerated. The deceased spoke of the legacy she intended to give the plaintiff; but it being suggested that as the plaintiff was a stranger in *London*, if she gave him a legacy of 100*l.* he would have to pay out of it a legacy duty of ten per cent. which would in some measure defeat her intention and prejudice the object of her bounty; it was at last agreed that the deceased should give her note of hand for 100*l.* which it was understood he was to forbear enforcing until after her decease: and accordingly a note in the following terms was given to the plaintiff:—" 100*l. Brentford, September,* 1, 1817. *I promise to pay to Stephen Woodbridge or order, on demand, the sum of one hundred pounds, for value received, and his kindness to me. Rebecca Bance.*" After the death of the deceased application was made for the payment of this note, and the executrix having refused to pay it the present action was brought. At the trial this note was given in evidence to support the second count of the declaration. On the part of the defendant it was contended, first, that the note in question

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operated as a *donatio causa mortis*, and that the action therefore would not lie. Second, that as the deceased intended to leave the 100*l.* to the plaintiff as a legacy, and as she had given him a note instead, which was not to be put in force until after her death, it was a fraud on the legacy duty, and therefore was not available in a court of law. And, third, that at all events the defendant was at liberty to give parol evidence to defeat the note, by shewing that it was not given for good and valid consideration. At the trial the plaintiff was nonsuited, on the ground that the note could only operate by way of testamentary disposition. Liberty however was reserved to the plaintiff to move to enter a verdict upon any one of the counts of the declaration.

Scarlett accordingly obtained a rule to shew cause in last Term, why the nonsuit should not be set aside and a verdict entered upon the second count.

Marryat and *Adams* now shewed cause against the rule, and contended that the note upon which the action was founded would only operate as a *donatio causa mortis*; but supposing such a conclusion could not be drawn from the terms of the note itself, still the defendant was at liberty to go into parol evidence to contradict its import, and if so, they urged it to be perfectly clear that the action would not lie; for if the note was to be treated merely as a legacy, it was an arrangement by which a fraud would be committed on the legacy duty.

Scarlett and *Abraham* in support of the rule submitted, first, that the note in question could not operate as a *donatio causa mortis*, because it was given only when the maker was in an ailing state, and not in contemplation of her death (*a*); besides which, a

(*a*) *Tate* v. *Hilbert*, 2 *Ves.* Jun. 111.

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promissory note is not the subject of a *donatio causa mortis*, for the note is merely a chose in action, and it ought to be a chose in possession to pass by way of *donatio causa mortis*. *Miller* v. *Miller* (*a*). But even supposing the note in question could pass by way of a *donatio causa mortis*, the plaintiff might proceed at law (*b*). But in all events the note cannot operate by way of testamentary disposition (the ground upon which the nonsuit proceeded at the trial), because nothing appears on the face of the note to indicate such intention, and all the cases at law and equity shew, that where an instrument operates as a testamentary disposition, something must be expressed on its face from whence such an intention can be collected. For this they cited *Chaworth* v. *Beech*, (*c*) and *Roberts* on Wills, *passim*. As to the argument that parole evidence was admissible to contradict the note, it is clearly laid down in *Hoare* v. *Graham* (*d*) and *Free* v. *Hawkins* (*e*), that a parol agreement made at the time a promissory note is made, which parol agreement is contradictory to the note, cannot be given in evidence to defeat the note, nor is it available in any way whatever; and therefore on this ground alone the plaintiff is entitled to recover. Then as to the last objection, on the ground that this was a fraud upon the legacy duty, it could not attach in the present case, because it is quite clear that the deceased might dispose of that by gift in her life time which she meant to have left as a legacy; and as no legacy duty ever attached, there could be no fraud. Such supposed frauds as this cannot often happen, as very few persons would like to part with the dominion over their property in their life-time.

This answer to the last mentioned objection was in

(*a*) 3 *P. Will.* 356. (*b*) 2 *Ves.* Jun. 122. (*c*) 4 *Ves.* Jun. 555.
(*d*) 3 *Camp.* N. P. 57. (*e*) 1 *Moore*, 535.

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the course of the argument approved of and adopted by the Court, and did not enter into their consideration in giving judgment upon the other points, except by BEST J. who commented shortly upon it.

ABBOTT Ch. J. said, that after the discussion which had taken place upon the question whether the note operated as a *donatio causa mortis*, or as a testamentary disposition, he was now clearly of opinion, for the reasons stated and the cases cited in argument, that it could not be so considered. Upon the second point, as to the admissibility of parol evidence to contradict the note, he was also of opinion upon the established rule of evidence, that parol evidence cannot be admitted to contradict, add to, or vary the terms of a written instrument; that the objection must fall to the ground, and consequently that the rule must be made absolute.

BAYLEY J. I am of opinion that the verdict in this case should be entered for the plaintiff. It seems to me that this instrument is a security for money, which would be binding upon the maker in her life-time, and consequently that it would be binding upon her effects after her decease, for which latter purpose we are informed the note was given by the testator. The testator by the note says, "I promise to pay *Stephen Woodbridge*, or order, on demand, the sum of one hundred pounds, for value received." That is clearly obligatory on the party who makes the note; and though the plaintiff by a secret understanding between him and her, forbears to demand the money until after her death, still it is binding on her assets, and her executor is under an obligation to pay it. But here there are the words "on demand;" the party therefore who has made that note has in terms said "that whenever the plaintiff shall think fit to call upon me for pay-

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ment, I bind myself that I will then pay;" and it would be extremely dangerous and inconsistent with those general rules of evidence upon which we proceed in courts of justice, to allow a party after having given an instrument in which he says "I promise to pay on demand," to say by parol evidence, "You know I did not mean to pay on demand, but I merely promised to pay when I should die." It is a general rule of evidence universally adopted in courts of justice, that parol evidence cannot be received to contradict a written instrument. Therefore, I think that in this case, the defendant was not at liberty to give evidence to shew that the note was not given for good and valuable consideration, and that it was not payable on demand, but intended to be postponed till after the party's death. But if any such evidence could be received at all, it could only be received for the purpose of shewing that payment was to be postponed until after the testator's death. But in that view of the case, it would be still obligatory upon the representatives of the deceased; for at all events, it never could be in the contemplation of the testator that the instrument was liable to be defeated.

HOLROYD J. I am of the same opinion, that the nonsuit in this case should be set aside. The evidence offered at the trial was for the purpose of shewing that there was a want of consideration for the note, or that it was given under circumstances to make the note illegal. The evidence likewise was offered for the purpose of shewing that the note was not delivered to the plaintiff for the purpose of being paid until after the testator's death. It appears to me that the utmost extent to which any such evidence could be received, would be to shew that it was not to be paid in the manner which the note itself imports. But inasmuch as the evidence went to a much greater extent, namely,

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to the extent of contradicting the note itself, it appears to me that the case comes within the general rule of law, that parol evidence cannot be admitted in contradiction to written evidence; I mean in cases where parol evidence goes to shew that the instrument was not delivered to the party as an instrument, or that it was void under the particular circumstances. Supposing here that parol evidence could be received, for the purpose of shewing that the note was not to be sued upon until after the party's death, still that period has now arrived, and the action may be sustained. For these reasons, I am of opinion that the nonsuit must be set aside.

BEST J. I am of opinion, that whatever objection may arise to the first count of the declaration, the second is maintainable, and that the evidence offered to do away the effect of the note was not admissible. Here is a written instrument between the parties by which they are bound, and it would be contrary to the first principles of evidence, to receive parol testimony for the purpose of shewing that the written contract is different from that which it is supposed the parties intended. I know but of one exception to that general rule, and that is founded on public policy, namely, where the contract is illegal; but if it cannot be shewn that there is any illegality in the contract, the law must take effect. In cases of usury, the exception I have mentioned prevails, for the reason I have stated; but I believe this is the only exception. In this case it seems to me that the contract is not illegal, because there is nothing illegal in persons binding themselves to pay money for acts of kindness. If the contract, therefore, is not illegal, no evidence can be received to shew it was different from that expressed in writing.

Rule absolute.

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COOPER *against* NIAS.

Wednesday, Nov. 24th.

The defendant cannot sign judgment of *non pros.* for want of a declaration after the expiration of a year from the day of the return of the writ; for the cause is then out of Court, and the year is not to be computed from the time of putting in bail; and judgment so signed was set aside, but without costs. (*a*)

THE defendant was arrested upon a bill of *Middlesex*, returnable *Friday* next after the morrow of All Souls 1818, she being then a spinster, at the suit of the plaintiff, for 50*l.* On *Saturday* the 7th of *November*, in the same year, she surrendered into custody, and afterwards justified bail on the 11th. No proceedings were afterwards taken by the plaintiff; and on the 12th of *November* instant, the defendant's attorney signed judgment of *non pros.* and thereupon sued out execution for 8*l.* 8*s.* the costs incurred.

Abraham on a former day moved to set aside the judgment of *non pros.* and all subsequent proceedings, for irregularity; the alleged irregularity being, that the defendant, according to the practice of the Court, was not at liberty to sign judgment of *non pros.* after the expiration of a year from the time when the writ was returnable.

(*a*) The passage in *Impey's* Prac. K. B. 549, is this: if the defendant files common bail within the Term the writ is returnable, he has twelve months after to sign a *non. pros.* but he cannot do it at any time after. *White* v. *White*, *E.* 11 *Geo.* 3. This position led to the opinion that the defendant might sign judgment of *non pros.* within twelve months after the day of filing common bail; but it is now held, that the year is to be computed from the return day of the writ to which the filing of common bail relates. The practice of requiring the plaintiff to declare within a year is for the benefit of the defendant, and therefore should be construed most favourably for him. In *scire facias*, after judgment, the year is computed from the day on which judgment was actually signed. *Simpson* v. *Gray*, *Barnes*, 197; 6 *Mod.* 14; 1 *Stra.* 301. And the year depending upon the statute 13 *Edw.* 1, *c.* 45, the words of which are, *infra annum*, is to be construed by calendar months, and not by Terms. *Winter* v. *Lightbound*, 1 *Stra.* 301; *Tidd*, 6th ed. 1115. If the plaintiff suffers four Terms to elapse after the delivery or filing of a declaration, the defendant must have a Term's notice to plead. R. T. and 5 & 6 *Geo.* 2, note *b.* K. B.; *Tidd*, 6th ed. 483; *Imp.* 258. So if four Terms have elapsed after plea pleaded the plaintiff must have a Term's notice. *Id. ib. Tidd*, 717. So after four Terms have elapsed after issue joined there must be a Term's notice of trial. *Tidd*, 813; rule, *Mich.* 4 *Ann.* note *c*; 2 *Stra.* 1164; 3 *M.* & *S.* 500; and *Imp.* 359, where it is said, that if notice be given within the *year*, without having regard to the Terms, it is sufficient.

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Walford now shewed cause against the rule, and contended that the defendant's proceedings were irregular, for that the year within which the plaintiff must declare, must be computed from the time of the defendant's appearance, and not from the time of the return of the writ. This motion, he said, was made upon the foundation of the practice of the Court of C. P. and not the practice of this Court. He referred to *Tidd* 422, and to *Impey* 549, where it was laid down, that if the defendant filed common bail within the Term on which the writ is returnable, he has twelve months *after* to sign judgment of *non pros.* The defendant therefore had at least twelve months after his appearance, if not that time from the end of *Mich.* Term, to sign judgment of *non pros.*

Abraham, in support of the rule, contended that by the practice of this Court, the plaintiff must declare within twelve months after the return of the writ, and consequently, that if twelve months had expired before the judgment of *non pros.* was signed, both parties were out of Court. The writ here was returnable on the 6th of *November* 1818, and bail was not put in and justified until the 11th of that month. Judgment of *non pros.* was not signed until the 12th instant, by which it appeared that more than a year had expired since the return of the writ. He referred to *Worley* v. *Lee* (a) and *Penny* v. *Harvey* (b) and *Oldham* v. *Burrell* (c). It was now too late for the defendant to sign judgment of *non pros.* because both parties were out of Court. When bail is put in on one day, it has relation only to the first day of Term. Here the defendant had signed judgment in the 5th Term after the writ was returnable. The question for the decision of

(a) 2 T. R. 112. (b) 3 T. R. 123.
(c) 7 T. R. 26; *Parsons* v. *King*, 7 T. R. 7; *Sherson* v. *Hughes*, 5 T. R. 35; *Tidd*, 6th ed. 422.

the Court was, whether the defendant had twelve months after putting in bail, to sign judgment of *non pros.* or twelve months after the return of the writ. He contended that the twelve months must be computed from the latter event.

ABBOTT Ch. J. I think the safest and best course is to decide, that the twelve months should be computed from the return day of the writ. In the case of *White* v. *White* (a) it is said, that if the defendant file common bail within the Term the writ is returnable, he has twelve months *after* to sign the judgment of *non pros.* That is a very general expression. I think, in deciding that he has twelve months after, the computation must be made with reference to the twelve months after the day of the return of the writ.

HOLROYD J. (b) I have always understood the rule as laid down in this Court to be, that if the plaintiff does not declare within the year after the day of the return of the writ, the cause is out of Court; for the writ commands the sheriff to bring the body of the defendant into Court on a particular day, and when bail is put in it is entered as done at the return of the writ. So that the computation of the year according to that rule, ought to commence from the return of the writ. Undoubtedly the practice of the Court has been to give time to put in bail at a subsequent period; but where this takes place it is matter of indulgence.

BEST J. was of the same opinion.

Walford submitted that the Court would not make the rule absolute in the terms prayed, namely with costs.

(a) *Impey*, 549. (b) *Bayley* J. was absent.

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Abraham submitted that the costs ought to be allowed, on the authority of *Wynne* v. *Clarke (a)* where it was held, that if the plaintiff declares after two Terms from the Term in which the writ is returnable, the Court will set aside the declaration with costs.

ABBOTT Ch. J. Upon a very nice point of practice like this, depending upon the calculation of three or four days, I think we ought not to give the plaintiff costs. The question was whether the year was to be calculated from the return of the writ, or the day on which the bail was put in. Upon such a question the defendant's attorney might very naturally make a mistake, and therefore I think this is not a case for costs.

Rule absolute without costs.

(a) 5 *Taunt.* 649.

Thursday, Nov. 25th.

HOLAH *against* FLEET.

The defendant is at liberty to move for judgment as in case of a nonsuit in the same Term in which the issue is entered. (b)

COTTINGHAM on a former day moved for a rule to shew cause why judgment as in case of a nonsuit should not be entered in this case. A declaration was filed in *Michaelmas* Term last, issue was joined in *Hilary* Term, and in this Term the defendant ruled the plaintiff to enter the issue; and the question was

The defendant may have a rule to enter issue and judgment as in case of a nonsuit in the same Term.

(b) So in C. P., the defendant may rule the plaintiff to enter the issue and move for judgment as in case of a nonsuit, the same Term. *Peters* v. *Throgmorton*, 1 *Bos. & Pul.* 387. *Tidd*, 6th ed. 825. *Anonymous*, *Easter* Term, 1815, *May* 1st. *Holt* shewed cause against a rule for judgment as in case of a nonsuit; contending that in this case the defendant could not rule the plaintiff to enter the issue and move for judgment as in case of a nonsuit in the same Term. He said that in *Tidd's* Practice it is laid down, that it may be done in the Common Pleas, but does not say it can be done in this Court; and said he understood it had not been the practice so to proceed in this Court. *Le Blanc* J. I see no reason why it should not be done, though I believe it has not been the practice to do it. Rule absolute.

whether the defendant was at liberty to move for a judgment as in case of a nonsuit, in the same Term in which the issue is entered.

Chitty shewed cause against the rule, and contended, that although issue was joined in *Hilary* Term, yet as no notice of trial had been given, and the defendant ruled the plaintiff to enter issue in this Term, he could not in the same Term take another step in the cause and move for judgment as in case of a nonsuit. There was no default on the part of the plaintiff.

THE COURT held that as the issue was joined so long ago as *Hilary* Term last, the defendant was at liberty to move for judgment as in case of nonsuit in the same Term in which the issue was entered.

The rule however was discharged upon the plaintiff giving a peremptory undertaking to try at the Sittings after this Term.

EX PARTE DAVIS.

Thursday, Nov. 25th.

An attorney having practised for two years without having taken out his certificate, in consequence of the negligence of his agent, was readmitted without sticking up the usual notices, or paying the arrears of duty. (*a*)

E. *LAWES* applied to readmit an attorney whose agent had for two years neglected to take out his certificate, having received instructions so to do. He had continued to practice, not knowing that his certificate had not been taken out; and therefore he now applied to be re-admitted upon paying up the arrears of duty, and without sticking up the usual notices.

The COURT at first doubted whether this latter re-

(*a*) Vide *Ex parte Richards*, *ante*, 101; *Ex parte Bartlett*, *ante*, 207; *Ex parte* ———, *ante*, 316; vide *Ex parte Platts*, *post*, 692. The 37 *Geo.* 3, *c.* 90, *s.* 31, provides that the Court may readmit, on payment of the arrear of duty, and of such sum by way of penalty, as the Court shall think fit; but see *Ex parte Vaughan*, *Tidd*, 6th ed. 67, *semb. contra.*

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Ex parte Davies.

quisite could be dispensed with; but upon referring to the master, it was held not to be necessary, and the attorney was admitted on the terms prayed.

Thursday, Nov. 25th.

Anonymous.

The Court will not set aside an award on the ground that the arbitrator was mistaken in law, unless the principles of law upon which he has decided appear upon face of the award. (*a*)

THIS was a rule calling on the plaintiff to shew cause why the award made in this case should not be set aside on the ground that the arbitrators had mistaken the law upon which their award was founded. The principle upon which the arbitrators proceeded, was not stated upon the face of their award, and the question was whether the Court would grant the relief prayed, upon affidavits tending to shew that the principles upon which the arbitrators founded their decision were not conformable to law.

Gaselee for the plaintiff and *Campbell* for the defendant.

(*a*) See the case of *Ainsley* v. *Goff*, and other cases in *Caldwell* on Arbitration, 53 to 62. In *Doe* on demise *Bullock* v. *Thomson*, *Mich.* T. 1817, *Nov.* 10th. *Scarlett* moved to set aside an award, and it was laid down by *Bayley* J. as a rule, that where the law and fact are referred to an arbitrator, the award will not be set aside, unless there appear to be error in law on the face of the award; and in conformity with this doctrine the rule was refused. In order to impeach an award, upon the face of which no objection appears, it is not sufficient to state facts, from which it may be inferred that the award was founded upon an incorrect notion of the law of the case. *Delver* v. *Barnes*, 1 *Taunt.* 48. If an arbitrator acts manifestly against law, the Court will set aside the award. 3 *East*, 18; 13 *East*, 358; 6 *Taunt.* 255; but if the matter referred be a mixed question of law and fact, the award will not be set aside on an affidavit of facts, showing that the sum awarded had been allowed in respect of an illegal transaction. *Wohlenberg* v. *Lageman*, 6 *Taunt.* 254. And where a cause, involving a question at law, was referred to a barrister, under a rule of Court to settle all matters in difference between the parties, and he made his award thereupon, but *the question of law did not appear upon the face of the award*, the Court considering that it was the intention of the parties to refer the decision of the merits as well upon the matter of law as of fact to the arbitrator, refused to open the award again, upon a suggestion of the arbitrator's mistake in point of law upon the construction of a contract between the parties. *Chace* v. *Westmore*, 13 *East*, 357.

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ANONYMOUS.

THE COURT after much deliberation, laid it down as a general rule in cases of this nature, that they would not suffer the legal principles upon which an arbitrator decided to be discussed, unless those principles appeared to be distinctly stated on the face of the award. If an award is expected to be founded on a questionable principle of law, the parties ought to apprise themselves beforehand of the principle, and request the arbitrator to state it on the face of his award, in order that thereafter they might have the question discussed. In this case that had not been done, and therefore supposing the arbitrators to have been erroneous in their view of the law, their award could not be set aside.

Rule discharged.

PEATE *against* TRISCOTT.

Thursday, Nov. 25th.

Where a defendant cannot be found in order to serve him personally with a rule for taking out money deposited in the hands of the sheriff in lieu of bail, the Court will allow the service to be good, by leaving a copy of the rule at the defendant's last place of abode, and sticking it up in the office. (*a*)

PLATT moved for a rule to shew cause why the service of the rule in this case for taking out money deposited in the hands of the sheriff in lieu of bail, should not be deemed good service, by leaving a copy of the rule at the defendant's last place of abode, and sticking up another copy in the office; upon an affidavit, stating that upon inquiring at the defendant's last

(*a*) See *ante*, ——. In *Weller* v. *Robinson*, 1 *Taunt.* 433, C. P. it was held, that if a defendant's place of abode be unknown, application should be made to the Court that it may be deemed good service to affix the declaration in the office. And *Lawrence* J. observed, that if the general rule with regard to the service be relaxed, it should be on the special circumstances of each particular case, upon a disclosure of which the Court of King's Bench has in many cases permitted a service of this sort to avail. But without the express permission of the Court such a service is insufficient. *Dirris* v. *Mackensie*, 5 *Taunt.* 777; *Ward* v. *Neathercoate*, 7 *Taunt.* 145; where a plaintiff sued in person, and his residence was unknown to the defendant, and his servant refused to disclose it, the Court ordered that the affixing a notice of allowance of bail and notice of this rule in the prothonotary's office, should be deemed good service.

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place of residence, the deponent was informed that he was gone to sea.

The COURT granted the rule to shew cause under these circumstances, and it was afterwards made absolute.

Friday, Nov. 26th.

MONK'S *Bail.*

Bail rejected in this Court, it appearing that one of them had been before rejected in the Palace Court. (a)

ONE of the bail in this case on coming up to justify, admitted that he was rejected as bail in the Palace Court, in an action there brought against the same defendant, but said that he was rejected upon a technical objection.

BEST J. however rejected both bail for this cause.

(a) See *Snell's* bail, *ante*, 82; *Waterhouse's* bail, *ante*, 307.

Friday, Nov. 26th.

SANDERSON'S *Bail.*

Affidavits containing general slanderous statements injurious to the character of bail, cannot be received. (a)

THE bail in this case were opposed upon affidavits containing general statements of an offensive nature, injurious to the character of the bail, who were

(a) Vide *Williams* v. *Hunt*, *ante*, 321, as to the relevancy of the matter in affidavit. It is important, for the protection of the party calumniated by unnecessary scandalous matter, that the affidavit should not be received or permitted to be filed, so as to record the libel; for it seems that no action can be supported in respect of libellous matter contained in an affidavit; see 1 *Saunders'* Rep. by Serj. *Williams*, note 1. Where a declaration on a surgeon's bill unnecessarily stated that the work was done in curing the defendant of the foul disease, the Court suggested the propriety of a motion for striking out those words, and to refer it for scandal and impertinence, and that they should direct the prothonotary to tax exemplary costs, and that the rule for referring scandal, &c. ought to be the same at law as in equity. See *Anon.* C. P. 2 *Wils.* 20. As to the practice in equity, see *Coffin* v. *Cooper*, 6 *Ves.* jun. 514. The Lord Chancellor there said, it is the duty of the Court to the public to take care that its records shall be kept pure. I agree that because an answer,

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SANDERSON'S BAIL.

represented as persons who bore the reputation of common swindlers in the neighbourhood in which they resided. No particular facts were stated in the affidavit from which such an inference would result.

BEST J. refused to allow such an affidavit to be read, and strongly condemned such sweeping attacks upon men's characters, without condescending to state any particulars to justify the imputations. The parties who made such an affidavit were amenable to the law, if the imputations were unfounded.

The bail were allowed to justify.

D. F. Jones and *Chitty* for the plaintiff, and *Comyn* for the defendant.

strongly reflects, it is not to be considered scandal, if material and relevant to the justice of the case; but the suggestion is enough to put it upon the Court to examine whether it is scandalous; and whether, if it is, it is not to be considered so, because material or relevant. Hence it seems, that whenever it is essential for the purposes of justice that fraud or other matter should be disclosed by affidavit, it may be stated, but should be set forth with certainty and precision, and not as matter of mere report and opinion.

HILTON *against* JACKSON.

Friday, Nov. 26th.

Regular proceedings on the bail bond cannot be set aside where the motion is made on behalf of the defendant without affidavit of merits, although the plaintiff had opposed the justification of bail, and received the costs of opposition. (a)

ADOLPHUS on a former day obtained a rule to shew cause why the proceedings on the bail bond in this cause should not be set aside upon payment of costs, on the alleged ground that although the bail bond had become forfeited by the bail above not having been put in in due time, yet that the assignment of the bail bond had taken place after bail had been in and perfected.

(a) See *Merryman* v. *Quibble*, *ante*, 128, and the rule of Court, *Mich.* 59 *Geo.* 3. there cited. *Bell* v. *Taylor*, *ante*, 572.

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HILTON *against* JACKSON.

Chitty now produced an affidavit in shewing cause against the rule, which negatived the fact of the assignment having taken place after the bail had been put in and perfected, and he contended that this rule must be discharged, the defendant not having entitled himself to the indulgence of the Court by swearing to merits, in compliance with the rule of last *Michaelmas* Term.

Adolphus, in support of the rule, stated that notice of justifying bail had been given for the first day of this Term, upon which occasion the plaintiff instructed counsel to oppose the bail, and insist upon the costs of a former opposition in last Term, the costs of another opposition at chambers in the vacation, and also the costs of the last opposition. All these costs had been paid, and he admitted that the assignment of the bail bond had not taken place until the time of putting in and perfecting bail had expired; but he submitted, that the payment of costs in the manner described, would alone entitle him to set aside the proceedings of the bail bond and operate as a dispensation of the rule of Court which required an affidavit of merits.

HOLROYD J. (*a*) said that the payment of the costs of three different oppositions did not dispense with the necessity of producing an affidavit of merits in compliance with the rule of Court, which rule was peremptory upon this subject.

Rule discharged.

BEST J. before whom this motion at first came on, was of the same opinion: and HOLROYD J. at the rising of the Court to-day, said, he had mentioned the case to the other Judges, who were of the same opinion, but thought that the rule ought to be discharged without costs.

(*a*) The only Judge in Court.

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Friday, Nov. 26th.

RANDALL *against* GURNEY.

The summons of an arbitrator, to whom a cause has been refered by order of the Court of Chancery, protects a party from arrest under process of this Court whilst employed in the *bona fide* obedience to the summons. But when a party residing in *L.* was summoned to attend an arbitrator at *E.* and was required to bring with him certain papers then at *C.*; and he went to the latter place, where all his papers were, to make a selection, and having staid there more than 24 hours for that purpose and necessary refreshment, was arrested. The majority of the Court held that he was not entitled to be discharged out of custody, having no right to stop and sort his papers. *Abbott* Ch. J. *dissentient*. See the following case in Court of Exchequer. (*a*)

CHITTY on a former day moved to discharge the defendant out of custody of the Sheriff of *Somersetshire* on filing common bail, on the ground that he was arrested on his way to attend an arbitration in pursuance of a summons directed to him by the arbitrator for that purpose.

The case upon the affidavits was this:—by an order of the Lord Chancellor, a cause depending before his Lordship, in which the defendant was the complainant, was referred to the arbitration of a Mr. *Bozon* at *Exeter;* and the order directed that the parties should attend the arbitrator with their papers and documents if required. The defendant received a summons on the 15th of *September*, he being then resident in *London*, requiring him to be at *Exeter* at 12 o'clock on *Monday* the 20th of *September*, and bring with him certain papers mentioned in the summons. These and all other papers belonging to the defendant were at *Clifton*, in the care of deponent's wife who had for some time been on a visit there, and whither it was necessary for him

(*a*) See *Tidd*, 6th ed. 204; in *Spence* v. *Stuart*, 3 *East*, 89, it was held, that a defendant attending an arbitrator to be examined under a rule of Court is privileged from arrest, *eundo morando et redeundo*. Lord *Ellenborough* said the defendant was clearly privileged, and the privilege extends to *redeundo* as well as *eundo et morando;* and it does not appear that he has been guilty of any negligence in not availing himself of his privilege *redeundo* within a reasonable time, for the arrest took place early in the morning, before it could be known whether the party was about to return home or not. In *Rex* v. *Priddle*, *Tidd*, 6 ed. 204, where an attorney had been attending a cause at the *Middlesex* Sittings in Term, which was put off till the adjournment day, after which he went with his witnesses to a coffee-house, where he was arrested three hours after the rising of the Court on an attachment for non-payment of money, the Court held that an attorney was not to be allowed so long a time to speak to his witnesses on such an occasion before he went home, and that he was properly taken. *Tidd*, 6th ed. 204; 1 *Smith* Rep. 355; see *Lightfoot* v. *Cameron*, 2 Sir *W. Bla.* Rep. 1113, 1190; *Childerston* v. *Barrett*, 11 *East*, 439.

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to go in order to comply with the arbitrator's summons. On the morning of the 16th of *September* he left *London* with a professional gentleman acting as his attorney, and arrived at *Clifton*, which is a short distance out of the direct road, about five o'clock in the afternoon of *Friday* the 17th of *September*, and began to examine and sort the different papers, and slept there that night. The next day he and his professional adviser continued to occupy themselves in selecting the papers which he was required to produce before the arbitrator, and in the afternoon of that day, when he had nearly arranged the papers, and before he could continue his journey to *Exeter*, he was arrested, and he executed the bail bond. On *Sunday* morning he continued his journey, and arrived at *Exeter* just before 12 o'clock on *Monday*; the question was, whether under these circumstances he was entitled to be discharged on common bail.

Marryatt contended that the defendant was not entitled to his discharge, inasmuch as the protection which the law threw round a witness in these circumstances would not justify the party in a *malâ fide* deviation, under pretence of obeying the summons. Although the defendant in this case might necessarily be obliged to go to *Clifton* for his papers, yet he was not justified in staying there on the *Saturday*, when he was arrested. He should have promptly pursued his journey the moment he got his papers, without staying to assort them, which he might have done when he arrived at *Exeter*; and the privilege claimed ought to be construed strictly.

Chitty and *Wylde*, in support of the rule said, that the question was, whether the defendant had unnecessarily deviated from his direct road, in proceeding to obey the summons of the arbitrator. If he had not, he was clearly

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entitled to his discharge. The Court would allow a liberal latitude to a person in his situation. There could be no doubt that the summons of the arbitrator, which was tantamount to a subpœna *duces tecum*, would protect him in the *bona fide* obedience to that summons. It was matter of imperative necessity that he should go to *Clifton* to procure the papers which he was required to produce. All his papers were at that place, and some time must be allowed him for selection, and it was too much to say that the stoppage of one day for this purpose was to deprive him of the protection claimed. Having arrived on the *Friday* evening it was too much to expect that he should immediately make the selection from his papers and forthwith proceed on his journey. Some time was requisite for necessary refreshment and repose, and as no dilatory consumption of time could be imputed to him, the Court would give him the full benefit of that protection which the summons must be intended to afford. There was this strong circumstance in the case, that the defendant, with his professional adviser personally accompanying him, was on his journey to attend the arbitration, and not returning from it, when the summons might be supposed to have spent its protection. They referred to *Willingham* v. *Matthews*, (*a*) *Amey* v. *Long*, (*b*) *Hoi* *y* v. *Pitt*, (*c*) and *Moore* v. *Both*. (*d*)

ABBOTT Ch. J. was of opinion that the defendant was entitled to be discharged out of custody under all the circumstances of the case; it appearing to his Lordship that the defendant at the time he was arrested was in the *bona fide* performance of a duty required

(*a*) 6 *Taunt.* 356; 2 *Marsh.* 57, S. C. (*b*) 9 *East*, 473.

(*c*) 2 *Stra.* 987; *Tidd*, 203.

(*d*) 3 *Ves.* jun. 350. See *Bromley* v. *Holland*, 5 *Ves.* 2; *Ex parte Kerney*, 1 *Atk.* 54; *Ex parte Lund*, 6 *Ves.* 781; *Tidd*, 6th ed. 203.

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of him by the arbitrator's summons. Reasonable time must be allowed to a witness for necessary refreshment in the course of a long journey. Had the defendant merely gone to *Clifton* to see his wife, the case would be extremely different; but inasmuch as he was obliged to go to that place to select his papers, he would have a right to make some stay for that purpose, as well as for ordinary refreshment.

The other Judges were of a different opinion, and held, that the defendant at least had no right to stay at *Clifton* to sort his papers, but was bound to proceed promptly to *Plymouth* as soon as he got possession of such papers.

Rule discharged.

In the Court of Exchequer, Saturday, Nov. 27th.

RICKETTS *against* GURNEY.

Held by the majority of the Court, that the defendant was under circumstances resembling those in the last case, privileged from the arrest. The application may be made either to the Court under whose process the privilege is claimed, or to the Court out of which the process issued, upon which the party was arrested.

CHITTY and *Wylde* on a former day made a similar motion in this Court on affidavits in this cause, in substance the same as in those of *Randall* v. *Gurney*, *supra*.

D. F. Jones and *Platt* now shewed cause, and urged that the privilege *eundo morando* and *redeundo* ought not to be extended so as to impede the course of justice and afford protection for debtors who absented themselves in order to avoid the payment of just debts; and that in the present case the defendant was not justified under pretence of attending the arbitrator in going to *Clifton* out of the direct road, and at all events his stay at *Clifton* upwards of twenty-four hours under pretence of sorting papers, was not to be excused, for he ought to have had the papers in his own possession, or at least might have caused them to be forwarded to *Exeter*, and might there have assorted them.

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They also urged, upon the authority of *Kinder* v. *Williams*, 4 T. R. 378, that the proper course was for the defendant to apply to the Chancellor, and that this Court could not interfere.

Chitty and *Wylde* argued that it was essential for the purposes of justice, that witnesses and persons required to attend any Court of competent jurisdiction to decide upon the matter in litigation, should be protected from arrest whenever they were *bona fide* proceeding towards that Court for such purpose; for otherwise the fear of arrest would deter the party from obeying the subpœna, and thus the due investigation of the matter would be prevented. That the protection was provided by law with reference to persons under embarrassments, and the very circumstance of the party in the present case having adopted measures generally to avoid his creditors, constituted a stronger reason for the interference of the Court in his favour; and therefore the only question was, whether it was to be collected from the affidavits that the defendant at the time of his arrest was *bona fide* proceeding to attend the arbitrator. They referred to the cases in *Bac. Abr.* tit. Privilege, B. 2. and *Willingham* v. *Matthews*, 6 *Taunt.* 356, and 2 *Marsh* 57, to show that this privilege is not nicely scanned, but is to be construed fairly and liberally, and that a person is not bound to go the nearest or most direct way; and that in the present case it was obvious that the defendant would not have left his place of retreat in *London*, had it not been for the summons of the arbitrator, that he *bona fide* went to *Clifton* with a view to obtain and to assort papers necessary to be produced before the arbitrator. With respect to the other objection, that this Court was not competent to interfere, they referred to the case of *Spence* v. *Stuart*, 3 *East*, 89, in which it appeared that the Court of King's Bench set aside a bail bond taken upon an arrest upon process out of

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that Court, although the privilege was founded upon the party's attendance upon an arbitrator in pursuance of the rule of another Court; and in the case of *Walker* v. *Webb*, 3 *Anstr.* 941, this point was expressly determined. They submitted that the privilege from arrest was not, as had been supposed, founded alone on the supposed contempt of the Court which the party was about to attend, but proceeded upon the right of the individual to be exempt from the process of any Court during his attendance, and therefore it was competent to him to resort to either Court.

The Court stopped *Chitty* and *Wylde* from further arguing that point, as they were satisfied the motion was properly made to this Court. (*a*)

GRAHAM B. and WOOD B. held, that the rule must be made absolute on the ground that the defendant was privileged at the time he was arrested; that the privilege of a party attending an arbitrator or any other Court of Justice, ought to be liberally construed, in order that parties who may be apprehensive of arrests might not be deterred from attending the Court when summoned for that purpose. That in the present case the circumstance of the defendant having gone to *Clifton* out of the direct road, and his stay there, appeared to fall within the principle upon which the protection is afforded; and that a person is not obliged to proceed on a long journey without rest and refreshment; and that the papers being at *Clifton*, the deviation out of the direct road was justifiable; and that it was not material whether the papers were sorted there or at *Exeter*.

GARROW Baron, considered that though the pro-

(*a*) In the last case the Court of K. B. expressed the same opinion, and *Marryatt* admitted the law to be so.

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tection ought to be liberally construed, yet on the other hand it was essential for the purposes of justice that it should not be so extended as to prevent creditors from recovering their just demands, and afford a protection to debtors beyond that which was necessarily incident to their attendance in compliance with the process of the Court; and that in the present case, upon consideration of all the affidavits, he did not think the defendant was entitled to his privilege; but that as the majority of the Court were of a different opinion, the rule must be made absolute.

Rule absolute accordingly.

M'CAULAY *against* THORPE.

Friday, Nov. 26th.

When it is necessary to postpone a trial for the purpose of sending abroad to examine witnesses under a commission, the Court will not put off the trial *until* they are examined, which is too indefinite, but to a definite period.

TURTON moved to postpone the trial of this cause, "until a commission could be sent out to *Sierra Leone*, for the purpose of examining certain witnesses resident there."

HOLROYD J. (*a*) said that the trial could be postponed only to a definite period, according to the practice of the Court. To postpone it "until a commission was sent out," or "until the witnesses were examined," was too indefinite. The practice was to fix the trial to come on at a given time, and then to apply to postpone it from time to time, as occasion required. (*b*)

Turton therefore took a rule to shew cause why the trial should not be postponed until the Sittings after next *Trinity* Term, for the purpose mentioned.

(*a*) The only Judge in Court.

(*b*) Vide *Hacker* v. *Hardy*, *ante*, 280, in notes.

1819.

Monday, Nov. 29th.

The Court will put off a trial in order to enable the defendant to apply for a commission for examining witnesses in *Africa* on interrogatories, in order to support pleas of justification to a declaration for a libel, where it appears that the plaintiff has not promptly brought his action after the publication of the libel, and has been otherwise dilatory in bringing the cause to issue. (*a*)

Scarlett, Gurney, and *H. J. Stephen* now shewed cause against the rule, and insisted that this was an application to which the Court would not accede in the present stage of the proceedings, the object of it being in effect to put off the trial *ad infinitum.* This was an action against the defendant for publishing an alleged libel upon the character of the plaintiff, and the declaration was delivered so long ago as *January* last. It would be extremely injurious therefore to the plain-

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It is not necessary to swear to merits in order to put off a trial on account of the absence of a material witness; nor will the Court, in the first instance, impose the terms of paying money into Court.

The Court upon a second motion to put off a trial on the continued absence of a witness, will if it thinks proper enquire into the circumstances; and it is not a sufficient ground to put off the trial as of course.

(*a*) In general if the defendant is unable to proceed to trial on account of the absence of a material witness, &c. he may move the Court in Term time, or apply to a Judge in vacation, on an affidavit of the facts, to put it off till the next Term, or if necessary, to a more distant period. *Tidd,* 6th ed. 826; *Stratford* v. *Marshall, Barnes,* 440. It is not necessary to swear to merits in order to put off a trial on account of the absence of a material witness; nor will the Court, at least on the first occasion, impose the terms of paying money into Court. *Cookson* v. *Simpson, Trin.* T. 1816, *June* 15th. *Gurney* shewed cause against a rule obtained by *Selwyn* for putting off a trial, on the ground of the absence of a material witness. He objected to the sufficiency of the affidavit, which did not swear to the merits; and he required that the money should be brought into Court. *Selwyn, contra,* contended, that in an affidavit for such a rule as this the merits were never sworn to, and it was never required as a term of this rule that the money should be paid into Court. Lord *Ellenborough* Ch. J. assented, and observed, that it would be ridiculous to swear to merits, for the other party would deny them; but he said the defendant might be called upon to pay the money into Court, if they applied again in *Michaelmas* Term to put off the trial further. Rule absolute. And see *Abraham* v. *Coates, ante,* 182. But upon a second motion to put off a trial, on account of the continued absence of a witness, the Court will, if they think proper, enquire into the circumstances; and it is not to be considered that the motion is to be put off as a matter of course. *Anon. East.* T. 1815, *April* 17th. The *Attorney General* had on a former occasion obtained a rule absolute for putting off a trial, on the ground of absence of a material witness, and he now moved again to put off the trial on the absence of the same witness, who still resided at *Ostend,* the place at which he was when the former motion was made. And *per* Lord *Ellenborough* Ch. J. It by no means follows, that because the trial has been once put off on account of the absence of a particular witness, who still continues absent, that the Court will put it off again without enquiry into the circumstances. This observation is made in answer to the suggestion that there was no real defence, which the *Attorney General* said was never sworn to upon applications of this nature.

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tiff to postpone this trial until the defendant could examine his witnesses abroad. It was incumbent upon every libeller to be prepared when called upon to prove the truth of his libel. The defendant in his affidavit did not venture to state that his witnesses were abroad at the time this action was commenced, and the Court would not now allow the defendant, by postponing the trial, to compel the plaintiff to consent to a commission for examining witnesses in *Africa*. They referred to *Calliand* v. *Vaughan* (a) in support of the argument.

Turton, in support of the motion, contended that the defendant was entitled to the usual indulgence allowed to persons in his situation, if he had not been guilty of *laches*. The facts of the case were these: this action was brought in *December* last, for an alleged libel published in the preceding *January*, and a declaration was delivered in the *January* of the present year. To this declaration the defendant pleaded twenty-six special pleas of justification, which required a considerable time to prepare; and after some time granted for that purpose the pleas were filed on the 24th of *April*, which was as early as they could by possibility be filed. The defendant then ruled the plaintiff to reply, and it was not until seven months afterwards that he took any notice of the rule, and then the only replication was the common and usual one, *de injuria*; and on the 22d of this month the paper book was made up and delivered. Under these circumstances, the defendant being doubtful whether the plaintiff would go to trial at all after the delay in replying, felt himself obliged to make this application to the Court, swearing, as he did, on the 25th instant, that his material and necessary witnesses were now re-

(a) 1 *Bos. & Pul.* 210.

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sident in *Sierra Leone*. The defendant had applied to the Court the very first moment that it became necessary for him to prepare his defence and prove his justification. It was sworn that application had been made to the plaintiff to consent to a commission, and that he had refused. The argument used against this motion, as to the hardship which the plaintiff would experience in postponing the trial, was of very little weight, when it was considered that the plaintiff had himself delayed his replication no less than seven months. Under these circumstances, he submitted that it was but reasonable the trial should be postponed for the purpose of examining the witnesses abroad. He referred to *Mostyn* v. *Fabrigas*, (*a*) *Doug.* 416; and *Wright* v. *Dolby*, and *Saine* v. *Hay*, both decided last Term, where the Court postponed the trials until the Sittings after this present Term, on account of the absence of a witness then in *America*.

ABBOTT Ch. J. The only doubt on my mind as to the propriety of granting this application is, that the defendant did not in an early stage of the proceedings give the plaintiff any intimation that he might require a commission to examine his witnesses abroad. That is the only point that has occasioned any doubt in my mind; but notwithstanding that, adverting to two circumstances in the case, namely, first, that this action was not brought until eleven months after the publication of the alleged libel; and secondly, that the plaintiff did not reply until seven months after the pleas were delivered, it seems to me not unreasonable to give the defendant the benefit of his application.

HOLROYD J. (*b*) I am of the same opinion, inasmuch as the plaintiff has suffered a long time to elapse

(*a*) *Cowp.* 161; *Tidd*, 6th ed. 853; *Phil.* Ev. 13.

(*b*) *Bayley* J. was absent.

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M'CAULAY *against* THORPE.

before he brings his action, and is guilty of greater delay before he brings the cause to issue, after the pleas are delivered. Under these circumstances, I think the defendant is entitled to the object of this rule.

BEST J. I am clearly of opinion, that if a man attacks the character of another, he thereby impliedly undertakes to be ready to prove the truth of what he writes; but on the other hand, the party who complains of an injury to his character ought to make his complaint immediately. I therefore accede to this motion, on the ground of the plaintiff's delay in not bringing the action in the first instance, as well as his subsequent tardiness when ruled to reply.

Rule absolute.

BARNETT *against* NEWTON.

Friday, Nov. 26th.

The defendant's time to plead being out on the 15th, and not having pleaded, his attorney took out a summons in the evening for a month's further time to plead, returnable at six o'clock on the following evening, and served it upon the plaintiff's attorney, who signed judgment on the morning of the 16th; Held that the judgment was regular. (*a*)

ABRAHAM on a former day obtained a rule, calling on the plaintiff to shew cause why the interlocutory judgment signed in this case should not be set aside with costs, for irregularity. The facts were these. The action was by original returnable the first return of the Term, 3d of *Nov.*; on the 10th the plaintiff delivered his declaration, indorsed to plead in four days. This would have expired on the 14th, but that being *Sunday*, the defendant had the whole of the 15th to plead in, and on the morning of the 16th, the defendant not having pleaded, the plaintiff was entitled to sign judgment. On the night of the 15th, the defendant's attorney served the plaintiff's attorney with a summons for a month's time to plead, returnable at 6 o'clock the following evening. The defendant's attorney called on the morning of the 16th for the plain-

(*a*) Vide *Morris* v. *Hunt*, *ante*, 93.

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tiff's attorney to indorse a consent for time, which he refused, stating that the time for pleading was out, and that he should sign judgment that day, which he did at the opening of the office. The irregularity complained of under these circumstances was, that the judgment was prematurely signed, for that the Judge's summons for time to plead was a stay of proceedings, and that while it was pending the plaintiff could not sign judgment; and *Morris* v. *Hunt* (a) was relied on.

Espinasse now shewed cause; he admitted that a Judge's summons for time to plead might in some instances operate as a stay of proceedings, but that was only when it was returnable before the plaintiff signed judgment. That was all which was decided in *Morris* v. *Hunt*, and the doctrine he contended for was founded on the authority of *Calze* v. Lord *Littleton* (b), which was there expressly recognized. But the rule of practice in this respect was more fully laid down in the case of *Morris* v. *Hunt* (c). There, as in this case, the summons was not returnable until 6 o'clock of the evening of the 15th, and it was held the plaintiff was entitled to sign judgment in the morning.

Abraham denied the generality of the rule, and insisted that the plaintiff having had notice before he signed his judgment on the morning of the 16th, was bound to obey the summons.

ABBOTT Ch. J. There is good reason for the distinction taken by the plaintiff's counsel. Where the summons is returnable before the plaintiff signs judgment, the Judge has the opportunity of hearing both parties, and using his discretion as to giving or withholding time to plead; but where the summons is

(a) 2 *B. & A.* 355; see *ante*, 93.

(b) 2 *Bla.* Rep. 951.

(c) *Ante*, 93.

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returnable afterwards, the plaintiff having a previous right to his judgment by the course of the practice, he ought not to be deprived of it by a proceeding which took place afterwards. It seems to me that the judgment was regularly signed, and that the rule must be discharged with costs.

The other Judges were of the same opinion, and the rule was accordingly discharged with costs.

JONES *against* DAVIS.

Friday, Nov. 26th.

Mere hardship and delay in being obliged to try a cause at *Lancaster*, when all the plaintiff's witnesses reside in *London*, is no ground for bringing back the *venue* to the latter place, unless the defendant is under terms to take short notice of trial, and not assign error for want of a special original (*a*)

STARKIE moved to bring back the *venue* in this case, from *Lancashire* to *London*, on the ground that all the plaintiff's witnesses resided in *London*, and that it would be extremely inconvenient, as well as a delay of justice, to have this cause tried at *Lancaster*.

HOLROYD J. said, that the hardship of the plaintiff's case was no ground for depriving the defendant of the benefit of having the trial where the cause of action arose. If the defendant was under terms to take short notice of trial in *London*, and had undertaken not to assign error for want of a special original, the case might be different; but otherwise the *venue* must remain where it was.

Rule refused.

(*a*) Vide *Jones* v. *Perks*, *ante*, 376. Though the *venue* be changed by the defendant upon a false affidavit, the plaintiff cannot bring it back to the county in which it was at first laid, without the usual undertaking to give material evidence in that county; and in this Court the rule for changing the *venue* is absolute in the first instance. *Price* v. *Woodburne*, 6 *East*, 433; *Guard* v. *Hodge*, 10 *East*, 32; *Tidd*, 642; and see also as changing the *venue*, *Roscoe* v. *Delano*, *ante*, 57.

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Saturday, Nov. 27th.

EXPARTE SMITH.

Attorney readmitted without payment of arrears of duty after ceasing to practice for five years, although the affidavit did not state that he was under no apprehension of complaint against him. (*a*)

STARKIE moved to readmit an attorney of this Court, without payment of arrears of duty, who had ceased to practise on his own account for five years. The affidavit stated, that during the interval he had been part of the time in a bad state of health, and that during the remainder he had acted as clerk to an attorney of the Court, for the sole and only benefit of the latter. The affidavit went on further to state, that no cause of complaint existed against him; that none had existed; but it did not state "that he was under no apprehension of any complaint against him."

HOLROYD J. doubted whether the affidavit was sufficient; but upon referring to the master as to the practice, he said the attorney might be admitted, although it was more correct to state in the affidavit that he was under no apprehension of complaint.

(*a*) Vide *Anon. ante*, 557, and other cases, *ib.* in notes; *Ex parte* ——, *ante*, 316. A solicitor in equity cannot be struck off the roll at his own request, without an affidavit that there is no other reason for the application. *Ex parte Owen*, 6 *Ves.* 11; *Ex parte Foley*, 8 *Ves.* 33.

Saturday, Nov. 27th.

EXPARTE PLATTS.

Attorney readmitted without a Term's notice, on an affidavit that for the last year he was not certificated in consequence of the negligence of his agent, who had been instructed to take out his certificate.

WALFORD moved to readmit this gentleman, an attorney of the Court, without sticking up the usual notices, and upon taking out his certificate for the last year; the affidavit stating that he had instructed his agent to take out for him a certificate for last year, but that the agent had neglected so to do. (*a*)

HOLROYD J. ordered him to be readmitted on the terms prayed.

(*a*) Vide *Ex parte Davis*, *ante*, 673 and cases there referred to.

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Saturday, Nov. 27th.

HUCKFIELD *against* KENDALL.

Where a Bill of exchange is referred to the master to compute principal, interest, &c. the plaintiff's attorney is not bound to serve the defendant with notice of an appointment for taxing of costs, unless defendant has served him with a rule for that purpose. (*a*)

ABRAHAM moved to set aside the interlocutory judgment signed in this case for irregularity, on the ground that this being an action on a bill of exchange, a rule had been obtained to refer it to the master to compute principal and interest, and that such rule having been made absolute without opposition, the plaintiff sued out execution without serving the defendant with an appointment to attend the taxation. This he submitted was irregular, and that the plaintiff was bound to serve the defendant with an appointment for taxation.

The COURT. These proceedings are quite regular. The plaintiff obtains a rule *nisi* to refer it to the master, to compute principal and interest upon the bill of exchange which is the subject of the action. The defendant does not shew any cause against that rule, which being made absolute, the plaintiff is not bound to serve the defendant with an appointment before the master. It is the defendant's own duty to take out a rule to be present, if he wishes to be present; but if he does not choose so to do, the plaintiff is not bound to give him notice. This has been very lately settled to be the practice.

Rule refused.

(*a*) See *Sellers* v. *Tufton*, *ante*, 466, note *a*; and *Anon. ante*, 467, note *a*; *Tidd*, 6th ed. 1025; and *Tidd's* Forms, 5th ed. 397,8. The defendant's attorney must obtain and serve a rule on plaintiff's attorney, ordering the latter to give him notice of the time of taxing costs, that he may be present if he thinks fit; and thereupon it is incumbent on plaintiff's attorney to give such notice before he proceeds to tax the costs. *Id. ibid.* The case of *Dawson* v. *Sladford*, *ante*, 468, is inaccurately reported. The practice in C. P. is different from that in K. B. 4 *Taunt.* 487.

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Saturday, Nov. 27th.

The Court has a summary jurisdiction over matters in difference between attornies and their clerks, and therefore where a clerk misconducted himself and left the service of the attorney to whom he was articled at the end of a year and a half, and the latter refused to take him back in consequence of his previous misconduct, the Court referred it to the master, who decided that a portion of the premium should be returned; and this decision was affirmed by the Court, though the point in question had been decided otherwise in a suit in the Exchequer. (a)

Ex parte Fisher.

Puller in last Term moved for a rule to shew cause why Mr. *Fisher*, an attorney of this Court, should not refund such portion as the Court should direct, of a fee received by him with a young man who was articled to him as clerk, under the circumstances then stated. In the same term, *A. Moore* was instructed to shew cause against the rule; but at the suggestion of the Court, the case was referred to the master, who, upon hearing the matter discussed, ordered part of the premium to be returned to the clerk's father, and a rule was drawn up imperatively calling upon Mr. *Fisher* to pay the money so ordered to be refunded on the first day of this Term. On that day *Puller* moved to make the rule absolute, but the discussions stood over until the 9th instant, when

A. Moore moved for a rule to shew cause why the order made by the master should not be discharged, on the ground that the master had no authority, under the circumstances before him, to make an order for refunding any part of the clerk's fee, and he referred to *Cuff* v. *Brown* and Others, (b) as a case directly in point. The Court then ordered the first rule to be enlarged, and directed both to come on together in order that the matter might be more solemnly discussed. *Puller* now shewed cause against *A. Moore's* rule. The case upon the affidavits was in substance this. The clerk was articled for five years, the master receiving the usual fee. After remaining with the latter for about a year and a half, during which time he behaved exceedingly ill, he left his master's service, and when brought back

(a) This summary jurisdiction is recognized by the stat. 22 *Geo.* 2, *c.* 46, *s.* 9.; *Anon. ante*, 559. See as to the return of a portion of the premium, *Therman* v. *Abell*, 2 *Vern.* 64; *Jackson* v. *Warwick*, 7 T. R. 121; *Grant* v. *Welchman*, 16 *East*, 207; *Chitty* on Apprentice Law.

(b) 5 *Price*, 297.

again by the father, the master refused to take him again, on the ground that he was a very unfit and improper person to remain in his office. The question under these circumstances was, whether the master was bound to refund any part of the apprentice fee.

Puller, in shewing cause against the rule for discharging the master's order, insisted that this was a matter solely in the discretion of the Court, inasmuch as all questions touching the conduct of attornies towards their clerks was peculiarly within the province of the Court to decide upon. When this question was first before the Court, it was referred to the master, apparently with the consent of both parties. That officer had made his award in conformity with that discretion which the Court would itself have exercised in deciding the case; and therefore it was now too late to set aside his order, on the ground that no such award could be made. At all events, unless it could be shewn that the Court had no jurisdiction over such matters, the decision of the master must be conclusive upon the subject. The whole point seemed to turn upon the question of jurisdiction.

A. Moore in support of his rule, did not so much doubt the jurisdiction of the Court over questions of this nature, as the correctness of the decision of the master in point of law. It was not by his consent that the question was originally referred to the master, but he yielded to that course of proceeding, at the recommendation of the Court. When the question was before the master, the late case of *Cuff* v. *Brown* was not brought under his consideration, and it was in consequence of that decision that the matter was now brought again under the notice of the Court. That case was decidedly in point, for there it was held, that if an apprentice after serving two years of his time,

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Exparte Fisher.

and without any misconduct on the part of the master, runs away of his own accord and enlists as a soldier, and afterwards is willing to return, but the master will not receive him again, the master is not compellable to return any part of the apprentice fee. There *Richards*, Ch. B. said, "The youth having remained as a clerk two years runs away of his own accord, and enlists as a soldier; he may or he may not come back; he chuses, however, to come back, and then he asks for a return of the premium. It does not appear that there was any misconduct on the part of the master; it is not fair, therefore, that the young man should demand a return of the consideration money, because he chuses to run away. There is another circumstance to be considered. He may stay with his master for four years, and then run away when his services are become more valuable; and is the master to lose the benefit of that service? It is stated, at one time the master was willing to take him back; but that makes no difference, for there is no contract to bind the master, and it was at the master's option to take him back or not." This was a case precisely in point, and all the observations there made were applicable to the case under consideration. The apprentice here having voluntarily put an end to the contract which existed between him and his master, the latter was not bound to return any portion of the premium. The question whether *Fisher* had or had not refused to take the apprentice back had nothing to do with this case. This was simply the case of a master who has refused to take back a clerk who has placed himself in such circumstances as to make it unfit for that master to take him back. On the authority of the decision cited, this was clearly not a case in which the master should be called upon to refund any part of the premium.

Abbott Ch. J. It is exceedingly convenient that

there should be a summary jurisdiction in this Court, for deciding differences between attornies and their clerks of this description. The legislature has given a summary jurisdiction to magistrates, as to apprentices of a different kind. This Court and the other Courts of *Westminster* Hall have, as far back as our practice will carry us, been in the habit of exercising a jurisdiction as to differences of this nature, between an attorney of the Court, who is an officer of the Court, and his clerk. It seems to me, that the exercise of that jurisdiction is a matter of great convenience, and I therefore think we ought not to forbear doing what our predecessors have done. As to the case recited in the Court of Exchequer, I do not mean to reflect upon or differ from it. There a return of premium was claimed, the question being discussed by a suit in equity; but that is a very different thing from an application to the jurisdiction of this Court over its own officers, who are peculiarly subject to its jurisdiction.

Bayley J. The attorney receives a premium as a compensation for keeping a clerk for a certain period of time, and for instructing him during that time. If at the end of a year the clerk goes away, having been guilty of great misconduct, and the master when he comes back exercises his discretion as to whether he shall take him back or not, and he determines that the young man shall not continue any longer with him, it is but reasonable he should return some proportion of the premium; and I cannot distinguish this case from a case where a lad after the end of a month's service absents himsef, and when he comes back, the master says, "No, I wont take him back again, because after having used him well for a month he runs away, and therefore I am entitled to keep the whole of the premium." I think that would be a very unreasonable proposition. I am of opinion therefore, that it is for the discretion of the

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master to say what part of the premium shall be returned.

Holroyd J. (a) concurred.

Rule absolute.

(a) *Best* J. was absent.

Saturday, *Nov.* 27th.

The King *against* ———

An indictment for a conspiracy "to defraud *J. W.* of divers goods, and in pursuance of the conspiracy defrauding him of divers goods, to wit, of the value of 100*l.*" cannot be quashed for not specifying the particular goods of which the prosecutor had been defrauded; and *Semble*, the Court in such a case will not call upon the prosecutor to deliver to the defendant a particular of the goods referred to in the indictment.

PLATT moved to quash the indictment in this case, or for a rule to shew cause why the prosecutor should not deliver to the defendant a bill of particulars of divers goods referred to in the indictment. As to the first part of his motion, he submitted that the indictment was bad for the uncertainty and generality of its allegations. It was an indictment for a conspiracy, "to defraud *John Wheatley* of divers goods, and in pursuance of that conspiracy, defrauding him of *divers goods, to wit, of the value of one hundred pounds.*" This allegation, he contended, was too uncertain, for the indictment should have particularised the specific goods of which the prosecutor was supposed to have been defrauded. If this was an indictment for felony in stealing the goods of *Wheatley*, it was clear this allegation would not do, because the indictment could not set out the goods in the general way. By analogy to the rule in cases of felony, he submitted, that in such an indictment as this, the goods should be particularised for the information of the defendant, who in this case had been a servant of the prosecutor for twelve months, during which time he had transacted sales for his employer in two hundred different instances, amounting in all to the value of 25,000*l.* It was of the utmost importance therefore to this defendant, that he should be apprized of the particulars of the alleged fraud, in order that he might be enabled to meet the charge, and prove his innocence. As to the second part of the

motion, he admitted that it was unprecedented, but he submitted, supposing the indictment to be good, that the Court would in such a case and under such circumstances call upon the prosecutor to deliver a particular of the transaction to which he meant to apply his evidence.

ABBOTT Ch. J. I am of opinion, in the first place, that we cannot quash this indictment, in consequence of any thing that appears upon the face of it. I agree that if this was an indictment for stealing the prosecutor's goods, it would be bad, for uncertainty; but in this case the gist of the indictment is *conspiracy*, and it may be, that there is so much uncertainty in the transaction which is the subject of the indictment, that the allegation cannot be stated with greater certainty. As to the alternative part of the motion, this is the first time I believe that ever such an application was made to the Court; and however hard the case may be upon the defendant, I am extremely unwilling, for the first time, to create a precedent of this nature, without very mature deliberation. The only case within my knowledge, in which this Court orders a particular to be delivered under an indictment for a misdemeanour, is that of Barretry, or where a man is charged with being a Barrator. It appears to me that the best course for the defendant in this case to take, is to apply to the prosecutor to give him some information as to the particulars upon which he means to rely in support of the indictment. If he refuses, then an application may be made to postpone the trial, in order that this question may be more maturely discussed. But whether discussed or not, the objection now suggested may be matter of very strong observation to the jury on the trial.

BAYLEY J. This case is not analogous to an indictment for felony in stealing goods, because the con-

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spiracy is the *gravamen* of the present indictment. The conspiracy may be to defraud the prosecutor, not of any particular goods, but of any goods he can get hold of; and it is not often in the power of a prosecutor to specify the particular goods of which he has been defrauded, because the object of the conspiracy may itself be uncertain. With respect to the application for a bill of particulars, it is quite new, and I think we cannot now make a precedent, without very serious consideration.

HOLROYD J. was of the same opinion. (*a*)

Rule refused.

(*a*) *Best* J. was absent.

THE KING *against the* JUSTICES *of* HEREFORDSHIRE *and the* COUNTY TREASURER *of the same Shire.*

Saturday, Nov. 27th.

Quo warranto will not lie against a county treasurer to shew by what authority he holds the office, if he has been *de facto* elected by the justices in Quarter Sessions; nor will *mandamus* lie to the Justices in Sessions to make a new election of a county treasurer, on the ground that one of the justices who had voted at the election had not taken the qualification oath, prescribed by 18 *G.* 2, *c.* 20, prior thereto, for the acts of the justice are not void, although he may be liable to penalties.

W. E. *TAUNTON* moved for a writ of *quo warranto*, to be directed to the county treasurer of *Herefordshire*, calling upon him to shew by what authority he held the office of county treasurer. This motion was founded upon a suggestion that the election of the said county treasurer was void, inasmuch as one of the Justices of the Peace, who voted at the election, had not at the time of the election duly qualified himself by taking the oath prescribed by 18 *Geo.* II. *c.* 20.

The COURT immediately interposed, and said that a writ of *quo warranto* would not lie in this case; and without some authority being cited for such a purpose, they could not now for the first time assume an authority which had not hitherto been exercised. They could grant a *mandamus* to the Justices in Sessions to

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elect a county treasurer where the office was void, but it being stated at the bar that there was a county treasurer elected *de facto*, they could not call upon that person to shew by what authority he held the office.

Writ refused.

W. E. Taunton then shaped his motion anew, and applied for a *mandamus* to the Justices at Sessions to elect another county treasurer, in the room of the gentleman already appointed, on the like ground stated in his first motion, contending that the election which had taken place was of no effect, inasmuch as the acts of the Justice already alluded to were null and void; and he relied upon the 18th *G.* II., *c.* 20, which declares that no person shall be capable of acting as a Justice of the Peace, who shall not before he acts at the Sessions of the county, take and subscribe the qualification oath therein set forth.

ABBOTT Ch. J. I am of opinion that we ought not to grant a *mandamus* in this case. The objection to the appointment of the county treasurer is, that one of the Justices who voted at the election had not previously taken the qualification oath, and consequently, that the act of that Justice is void, so as to annul the election. We cannot grant a *mandamus* to fill up such an office as this, unless it is actually void. Without looking at the wisdom of the rule, this Court does not grant a *mandamus* to appoint to an office which is already full. If it can be shewn that the office is filled colourably only, or by fraud, the Court would consider the appointment as invalid; but even then we should require a very strong case to be made out to justify our interposition. This, however, is not a case in which any thing amiss appears to have been done, and we cannot undo the act of the Justices by command

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THE KING *against* THE JUSTICES AND TREASURER OF HEREFORDSHIRE.

ing them to make a fresh appointment. This office is full *de facto*, and we cannot say that the act of the Justice, who had not taken the qualification oath, is void. In a very few weeks (*a*) the acts of this magistrate would be rendered completely valid by an indemnity act, and he will be a good Justice.

BAYLEY J. The acts of the Justice are valid, although he may be liable to certain penalties. Can it be contended that if a magistrate who has taken the qualification oath, that he is worth 100*l*. *per annum*, and from circumstances is afterwards reduced to 80*l*. and he commits a man after his income is so reduced, an action will lie against a gaoler for taking the man into his custody? If that cannot be contended, the argument here fails. The construction to be put upon the 18 *G*. II., c, 20 is, that the magistrate shall be only so far disqualified from acting that he shall be subject to certain penalties if he does act. In this case the acts of the Justice are valid, though he may be liable to penalties for not having taken the oath prescribed by the statute.

HOLROYD J. The statute merely operates as a personal prohibition, declaring that it shall be unlawful for the magistrate himself to act, and he is punishable for doing that which the statute prohibits him from doing; but his acts are not void.

Rule refused. (*b*)

(*a*) Parliament was sitting. (*b*) *Best* J. was absent.

Saturday, Nov. 27th.

THE KING *against* FRIAR.

The surveyor of a high road having improperly expended a large sum of

PEARSON moved for a rule to shew cause why a criminal information should not be filed against this person, a surveyor of a public road, for the alleged

misapplication of the funds deposited in his hands by the trustees of the road. He made this motion upon three grounds; first, that the defendant had acted contrary to the express provisions of the act of parliament for improving the line of road in question; second, that whether he had or not acted contrary to the provisions of that statute, he was guilty of a lavish expenditure of the public money; and third, that his appointment being of the nature of a public employment, he was criminally amenable to the cognizance of this Court, for any abuse of the powers entrusted to him. The case alleged was in substance this. By an act of parliament, certain trustees were appointed to effect the repair of the line of road in question, with power to borrow money by exchequer bills for that purpose. The act empowered the trustees to treat with the owners of lands and houses for the purchase of such parts of their property as were necessary for the completion of the intended work; but it expressly declared that the unanimous approbation of nine trustees was necessary to ratify such purchases, or any treaty for such purchases. Part of the money borrowed by virtue of this act, was deposited in the hands of a banking company, of which the defendant was a member. In contravention of the last mentioned provision of the act of parliament, the defendant, without the consent of the trustees, treated with the owner of some land in the line of the intended road, for an acre thereof, the price of which was to be five hundred guineas. This treaty afterwards came to the knowledge of the trustees, who decidedly objected to it, on the ground of the exorbitant amount of the price demanded for the land. The treaty was in consequence discontinued for the time, but was afterward renewed by the defendant, under the like state of ignorance on the part of the trustees, when the defendant concluded a bargain, by which the owner received a thousand guineas for half

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money, borrowed by the trustees under an act of parliament, without the consent of the trustees, which the act required to sanction the expenditure: The Court refused a criminal information against the surveyor, in the absence of any corrupt motive expressly alleged. The Court will not convert a civil, into a criminal remedy.

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an acre of the same land. Under these circumstances the question was, whether the defendant was criminally answerable by information.

The COURT said this was not a case in which they could so interfere. No criminal motive appeared to result from the case as stated. The defendant might have laid out money without lawful authority, and he was answerable for that money; but that circumstance could not be a foundation for a criminal accusation. As no criminal motive could be discovered, this would be converting a civil remedy into a criminal charge. This was not the application of money for purposes to which, generally speaking, by law, it might not be applied; but the ground of the complaint was, that he had applied the money for the purpose stated, without previously obtaining the consent of a certain number of the trustees, as was necessary by the provisions of the act. The defendant might be liable to make good the money if he had wrongfully applied it; but it was impossible to convert a civil into a criminal remedy, in the absence of any corrupt motive.

Rule refused.

Monday, Nov. 29th.

HOLME *against* DALBY, GENT. ONE, &c.

A bill was filed in *Trinity* vacation against an attorney as of the preceding Term, with a special memorandum of a subsequent day in vacation. The defendant pleaded a plea in abatement, entitled of the following Term, without a special imparlance: Held that this was regular, and judgment signed for want of a plea was set aside. (*a*)

A BILL was filed against the defendant, as an attorney of this Court, on the 6th of *September* last, with the usual special memorandum, stating that it was filed on the 6th of *September*, as of the preceding *Trinity* Term, and contained a statement of causes of action, which accrued after the last day of that Term; some on the 21st of *July* last, and others on the 1st of

(*a*) The Courts, with a view to discourage dilatory pleading, require

September last. The defendant filed a plea in abate- 1819.

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that a plea in abatement shall be filed, in the first instance, and at the earliest opportunity, unless it appear that the Court expressly reserved leave to the defendant to plead at a subsequent time. Hence it is a general rule, that a plea in abatement must either be entitled of the same Term as the declaration, or must be prefaced with a special imparlance, or the plaintiff may sign judgment. *Doughty* v. *Lascelles*, 4 T. R. 520; *Buddle* v. *Wilson*, 6 T. R. 569; *Blackmore* v. *Flemyng*, 7 T. R. 447 n. *d.*; *Lloyd* v. *Williams*, 2 *M.* & *S.* 484. But in the case of *Holme* v. *Dalby*, as it appeared upon the record that the bill was filed on the 6th of *September*, for causes of action occurring since *Trin.* Term, the defendant could not have pleaded as of *Trin.* Term, "that at the time of filing the bill on the 6th of *September*, he was an attorney of the C. P." The objection to entitling the declaration of *Mich.* Term applies equally to a special imparlance. The form of such imparlance is given and commented upon in 2 *Saun.* Rep. by Serjt. *Williams*, page 2, in notes. "And *A. B.* who is sued by the name of *C. B.*, in his proper person comes (*i. e.* in the Term of which the declaration is filed), and saving to himself all advantages and exceptions, as well to the writ as to the declaration aforesaid, prays leave to imparl thereunto here until next after the morrow of *All Souls*, and it is granted to him: the same day is given to the said *D.* here, &c.; at which day come, &c." If such an imparlance had been adopted here, the proceedings would have been manifestly incongruous, for the bill was not filed till after *Trin.* Term, and therefore no imparlance from that Term couldhave been prayed or granted.

Plea of misnomer. Mis-statement in the traverse at conclusion of the plea of the name by which the defendant is called in the declaration, is fatal on demurrer. (*a*)

In a plea in abatement, a mis-statement in the traverse at the conclusion thereof of the name by which the defendant is called in the declaration, is fatal on demurrer. *Lake*, administrator, v. *Inwood*, K. B. *Mich.* Term, 1818. Action of debt for work and labour, goods sold, and on the money counts and account stated. The defendant pleaded in abatement the misnomer of his christian name in the following manner: "And *William Inwards*, against whom the said *H. L.* hath exhibited his said bill, by the name of *Thomas Inwood*, in his own person, comes and says that he was baptized by the name of *William*, and by the christian name of *William* hath always since his baptism hitherto been called and known; without this, that he the said *William Inwards* now is, or at the time of exhibiting the said bill was, or ever before had been called or known by the names of *William Inwood*, as by the said bill is supposed; and this he the said *William Inwards* is ready to verify; wherefore he prays judgment of the said bill, and that the same may be quashed." To this plea the plaintiff demurred, and assigned the following cause. For that the said plea states, that by the said bill it is supposed that the defendant had been called or known by the name of *William Inwood*, whereas the said defendant is in the said bill sued and called by the name of *Thomas Inwood*, and is not therein supposed to have been called or known by the names of *William Inwood*, or any other name or names other than and besides *Thomas Inwood*, and also for that, &c. Joinder in demurrer.

(*a*) See note at the end of the case.

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ment, of his privilege as an attorney of the Court of Common Pleas, to be sued in that Court, and which plea was entitled generally of the present *Michaelmas* Term.

Chitty, in support of the plea. The statement of the name at the conclusion of the plea is incongruous, and may be rejected as surplusage. The Court will reject the words *William Inwood* in the traverse, these words being inconsistent; and without them the plea is perfect, and there is no incongruity. The plea states distinctly the defendant's christian name and surname; and consequently gives the plaintiff a better writ. The subsequent mis-statement of the name is merely a clerical error. *Alexander* v. *Mawman.* (a) That decision is in point, and establishes, that even in a plea in abatement, repugnant words may be rejected in support of the plea, *Gilbert*, C. P. 3d ed. (b) "What is redundant, and need not be put into the sentence, and contradicting what is before, is as if it had never been inserted." *Bac. Abr. Pleas and Pleading, Letter* I. 4. The incorrect words of the plea are merely superfluous. The declaration also is demurrable, being brought by an administrator in the *debet* and *detinet*.

Abbott Ch. J. I always thought that a plea in abatement must be taken most strictly. It must be verified by affidavit. In *Alexander* v. *Mawman*, the plea was good in substance; but here there is no substance, the plea is contradictory in itself. The traverse is necessary, and if this be rejected, what is there to stand? The plea may have been framed in this manner artfully and on purpose.

Holroyd J. was of the same opinion, and referred to *Hinon* v. *Binns*, (c) and the *King* v. *Shakespeare*. (d) If the proper judgment is not prayed on a plea of abatement, although the Court sees that the defendant is entitled to judgment, yet they will not give it in his favour on an improper prayer.

Judgment for the plaintiff.

When a misnomer is pleaded, the defendant must appear and plead by his right name, and not by the description. "And *he* who is sued, &c." *Peake* v. *Davis*, 5 *Taunt.* 653. *Haworth* v. *Spraggs*, 8 T. R. 515. The surname as well as christian name must be distintly stated, *id. ibid. Docker* v. *King*, 5 *Taunt.* 652. *Bac. Abr.* Misnomer F. In proceedings by bill, a plea concluding with a prayer of judgment, "of the *writ* and declaration thereon founded," is bad on demurrer. *Attwood* v. *Davis*, 1 *Barn.* & *Ald.* 172. In a suit commenced by bill, it seems proper to conclude by praying judgment of the bill, and not by praying judgment of the declaration or of the bill and declaration. *Lee* v. *Barnes*, 3 *Mod.* 144; 12 *Mod.* 133; *Moffat* v. *Van Millingen*, 2 *Bos.* & *Pul.* 124 n. c. *Lloyd* v. *Williams*, 2 *M.* & *S.* 484. 3 *Bla.* Com. 303. 2 *Chitty* on Pleading, 464. Pleas in abatement need not be demurred to specially. *Lloyd* v. *Williams*, 2 *M.* & *S.* 485: for the object of a special demurrer is to give an opportunity of amending. 2 *Stra.* 846; and it is not the practice to allow amendments in pleas of this description. Cases Prac. C. P. 29. *Tidd*, 675, 6th ed. It seems however advisable to demur specially for a trifling informality.

(a) *Willes*, 40. (b) *Gilb.* C. P. 3 ed. 132. (c) 3 *Term* Rep. 185.
(d) 10 *East.* 83. Vide etiam *Attwood* v. *Davis*. 1 *Barn.* & *Ald.* 172.

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The plaintiff signed judgment as for want of a plea; and on a former day the defendant obtained a rule to shew cause why such judgment should not be set aside for irregularity, with costs; the defendant's plea in abatement, with the usual affidavit annexed, having been duly filed on the fourth day of the Term.

Reader and *Chitty* now appeared to support the rule, and *J. Williams* to oppose it. But

The COURT said, that it was impossible to sustain the judgment, and that the general rule which authorises the plaintiff to sign judgment for want of a plea, when a plea in abatement entitled of a subsequent Term to the declaration, is pleaded without an imparlance, did not apply to a case of this nature, where it appeared on the face of the bill that the defendant could not have pleaded of a prior Term to a non-existing bill; and no imparlance from such Term to the present could, without incongruity, have been stated.

BRUTTON *against* BURTON AND MILLS.

Monday, Nov. 29th.

A warrant of attorney under seal, executed by one person for himself and his partner, in the absence of the latter, but with his consent, is a sufficient authority for signing judgment against both. A warrant of attorney to confess judgment need not be under seal. *Semb. aliter*, as to the authority to release errors. (*a*)

COMYN, on a former day, obtained a rule to shew cause why the judgment in this case signed on a warrant of attorney should not be set aside as to the defendant, *Burton*, and why he should not be discharged out of custody, under the *capias ad satisfac.* issued therein. The affidavit on which the motion was founded stated, that the other defendant, *Mills*, had without *Burton's* authority signed and sealed the warrant of attorney for both the defendants, who were partners in trade, as follow: " *Burton* and *Mills*, by *John Mills*, (*L. S.*)" And that *Burton* had never, by deed or other-

(*a*) In *Kinnersley* v. *Mussen*, 5 *Taunt.* 264, it was held, that a warrant of

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wise, authorised *Mills* to execute such warrant of attorney.

Wylde now shewed cause upon an affidavit, stating that the defendant, *Burton*, had frequently after the warrant of attorney was given admitted its validity, and that it was given with his concurrence; and he relied on *Ball* v. *Dunsterville*, & another, 4 T. R. 313, in which it was decided that if *A*. executed a deed for himself and his partner, by the authority of his partner, and in his presence, it was a good execution, though only sealed once. (*a*)

Comyn contended that that case only applied when the execution of the deed took place in the presence of the other partner; and insisted, that as it did not appear that *Burton* was present when the warrant of attorney was executed, it was invalid; and he referred to *Harrison* v. *Jackson* & others, 7 T. R. 207; *Elliott* v. *Davis*, 2 *Bos.* & *Pul.* 338, (*b*) which establish, that one partner cannot bind the other partners by deed. He also urged that as the warrant of attorney contained an authority to seal and execute a release of all errors, and was also under seal, the subsequent adoption of the warrant of attorney, without an instrument under seal, could not have any legal efficacy. But

attorney need not be by deed, and that it does not require an attesting witness. See also *Barrow* v. *Mashiter*, 4 *East*, 430. A warrant of attorney cannot be given by one of several executors, to confess judgment at the suit of all. 1 *Stra.* 20; 2 *Ves.* & *B.* 54; 1 *Rol. Abr.* 929, pl. 5. Nor can it be given by an infant. *Wood* v. *Heath*, *Mich.* T. 1814, *Nov.* 15th.

Judgment on a warrant of attorney set aside, one of the parties being at the time of the execution an infant.

Blackburn shewed cause against a rule which had been obtained by *Littledale*, to set aside a judgment entered up on a warrant of attorney, and proceedings therein, for irregularity; the irregularity being that one of the parties, at the time of the execution of the warrant of attorney, was under age. The rule was made absolute. See also as to a warrant of attorney given by several persons, *Harris* v. *Wade*, *ante*. 322.

(*a*) See also *Burn* v. *Burn*, 3 *Ves.* jun. 578, S. P.

(*b*) See also *Skiglit* v. *Edjintor* & others, *Holt's* C. N. P. 141.

THE COURT resolved, that as the affidavits in opposition to the rule completely established that the warrant of attorney was given with his consent, he was bound by it; and even admitting that in order to release errors, an authority under seal had been requisite, yet as to the other purposes, and especially the authority to confess judgment, parol consent was sufficient, therefore

The rule was discharged.

CUNNACK *against* GUNDRY.

Monday, Nov. 29th.

Declaration containing 98 counts upon as many promissory notes for one pound each, cannot be consolidated into one count. But a rule was pronounced for striking out all the counts but one, and giving the other notes in evidence under the count upon an account stated. (*a*)

BAYLY on a former day obtained a rule to shew cause why the declaration in this case, which contained ninety-eight counts upon as many one pound

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(*a*) Vide *James* v. *Shore*, 1 *Stark.* 426. In general where two actions are brought by the same plaintiff against the same defendant, for causes which might be combined in one action, the Court will oblige the plaintiff to consolidate them, and to pay the costs of the application. *Anon. East.* T. 1815, *May* 8th. *Espinasse* had obtained a rule, calling on the plaintiff to shew cause why he should not consolidate two actions in trespass against the defendant for fox-hunting over the plaintiff's premises, situate in the same parish, though committed at different times, and that the plaintiff should pay the costs of the application. *Heath* now shewed cause, admitting that a similar rule had been obtained with costs in *Cecil* v. *Brigges*, 2 T. R. 639. But he said, that there the party was held to bail, and it was not so in this case; and that there was no case which decided that the Court would act in the same manner where the party was not held to bail. *Sed per* Lord *Ellenborough* Ch. J. Holding to bail is only one instance of vexation; there may be many others: here the vexation that may be complained of is the bringing of two actions, when there was no ground for adopting such divided remedies. Rule absolute. See *Tidd*, 6th ed. 644. But the Court refused to consolidate two actions brought on two bonds, although they were precisely similar to each other. *Royal Exchange Company* v. ——, *Hil.* T. 1815, *Feb.* 6th. The Court will not allow the consolidation rule to be opened, on the ground that evidence has been discovered since it was entered into. *Pullen* v. *Parry*, *Hil.* T. 1812, *Feb.* 11th. *Scarlet* moved for a rule to shew cause why the consolidation rule entered into by the plaintiff should not be opened, and why he should not be at liberty to try the several causes, on the ground that fresh evidence had

Two actions for trespasses on the same premises at different times, brought by the same plaintiff, consolidated, and the plaintiff obliged to pay the costs.

When a consolidation rule has been entered into, though fresh

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country banker's promissory notes, should not be referred to the master to consolidate the said counts upon all the promissory notes for the like sum, and to strike out such other superfluous matter as the master should think fit.

Chitty now shewed cause, and contended that it was not possible to sustain this motion, which was without a precedent. It is not possible, as was suggested, to frame a declaration alleging, "that the defendant heretofore, to wit, on &c. made divers, to wit, ninety-eight promissory notes, and that by each and every of them respectively he promised to pay the sum of one pound."(a) There was indeed a similar motion made in *Lane* v. *Smith*, (b) but was refused. The declaration in that case contained two hundred and eighty-six counts, and the Court said that each of the notes being a special and distinct contract, it was impossible to state several of them in one count.

ABBOTT Ch. J. Could not the object be gained in this way. Supposing the party making the application should consent to enter into a rule, that all the notes except one shall be given in evidence under the count, upon an account stated either before the master, or before the jury, as shall be agreed upon, and that the

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evidence discovered, the Court will not permit the plaintiff to try the other actions.

been discovered. Lord *Ellenborough* Ch. J. If we grant this motion, we shall in fact decide, that where there is a scintilla of evidence subsequently discovered, a consolidation rule will not hold. It is dangerous at all times to admit subsequently discovered evidence. *Per Curiam*. Rule refused. But a consolidation rule has been set aside on bringing the money into Court, on the ground of the absence of a material witness. *Holman* v. ——, *Hil.* T. 1815, *Feb.* 9th. *Carr* applied for a rule to shew cause why a new trial should not be had, and why a consolidation rule should not be set aside. The cause had been tried, and a verdict was found for the plaintiff, and he now moved this on the ground of the absence of a material witness at the trial. The *Court* granted it on bringing money into Court.

Consolidation rule set aside, on the ground of absence of a material witness at the trial, on bringing money into Court.

(a) Vide *James* v. *Shore*, 1 *Stark.* 420.

(b) *Tidd*, 6th ed. 648; and 3 *Smith*, 113.

defendant shall bring no writ of error for want of a special original.

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Bayly and *Chitty* agreed to this arrangement, and accordingly

The rule was made absolute, "that it be referred to the master to strike out all the counts except the first, the defendant thereby undertaking to permit all the other notes to be given in evidence, either before the master or a jury upon the count upon an account stated, and that he would not bring any writ of error, and that the costs of the other counts and of this application should be costs in the cause."

NEWNHAM *against* DOWDING.

Monday, Nov. 29th.

A defendant being under terms to plead issuably, filed a special demurrer assigning for cause misjoinder of counts; and the plaintiff after this, having signed judgment as for want of a plea, the Court held that he could not treat such a demurrer as a nullity. (*a*)

MOTION to set aside interlocutory judgment, and all subsequent proceedings, with costs, for irregularity. The defendant had before judgment signed

(*a*) If the objection be such as is available only on a special demurrer, it seems that it cannot be taken advantage of when the defendant is under terms of pleading issuably; but a demurer for a defect in substance is in general otherwise. 3 *Burr.* 1788; *Bell* v. *Da Costa*, 2 *Bos.* & *Pul.* 446; *Berry* v. *Anderson*, 7 T. R. 536; *Cunning* v. *Sharland*, 1 *East*, 410; and it is said, that it should affect the merits of the case, *id. ibid.*; *Wright* v. *Russel*, 2 *Bla.* Rep. 223; *Stonehouse* v. *Vowell*, *Sayer's* Rep. 88; *Tidd*, 6th ed. 488. A demurrer without good cause cannot be filed, where the defendant is under terms of pleading issuably, as where in an action on a bill of exchange, the defendant demurred generally on the ground that though the bill was accepted payable at a particular place, and a special presentment at that place was stated in the declaration, yet no demand was stated to have been made upon the acceptor, nor was any special refusal alleged. *White* v. *Benson*, *Thursday*, 9th *Feb.* *Hil.* T. 1815. *Foljambe* shewed cause against a rule obtained by *Barrow*, to set aside judgment which had been signed by the plaintiff, on the ground that the defendant, who was under terms of pleading issuably, had not pleaded in conformity to the Judge's order. The defendant demurred generally to the declaration, and *Barrow* stated the cause of demurrer, which was, that the bill had been accepted

When time given to defendant, on condition he would plead issuably, and he demurred generally on ground that

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filed a *demurrer* in the office, being at the same time under terms to plead issuably. It was an action by executors on promises, at the suit of the testator in his life time, with a count for money lent by the executors after the death of the testator. The defendant demurred specially to the declaration for this misjoinder, and the question was whether such special demurrer was an issuable plea within the terms of the order, and whether the plaintiff was entitled to treat such a demurrer as a nullity, and sign judgment as for want of a plea.

Comyn now shewed cause against the rule for setting aside the judgment, and contended, that it was not competent for the defendant to demur, being under terms to plead issuably. The demurrer filed in this case was a mere evasion of the Judge's order for pleading an issuable plea, and the Court must now treat this as a sham demurrer, and support the judgment. In *Gray* v. *Ashton*, (*a*) a distinction was taken by the Court between a real and fair demurrer and a sham one; for the former is an issuable plea within the intent and meaning of the Judge's order, and the latter is only an evasion of it. In the present case it was true the defendant had only specially assigned the misjoinder as cause of demurrer, but the Court neverthe-

though presentment at place of special acceptance alleged no demand and refusal was alledged, plaintiff signed judgment and supported.
If presentment averred, it means due presentment.

specially; but though the declaration averred that a presentation had been made at the particular place, yet no demand and refusal was alleged. He cited *Gammon* v. *Schmoll*, 5 *Taunt.* 344, 1 *Marsh.* 80; see *Chitty* on Bills, 330, 5th ed. He urged, that it did not appear that the bill had been duly presented at the place, nor that it had been presented to the acceptor, nor that payment had been refused by him; and if such a presentment as this were good, a presentment at any time, though after the usual hours, would be good. *Sed per* Lord *Ellenborough* and *Bayley* J. This is no cause of demurrer. It is alleged that presentment was made according to the tenor and effect of the bill, which was sufficient, and there is a general breach. If a presentment is averred to have taken place, it necessarily means due presentment, otherwise it is nothing. *Per Curiam.* Rule discharged with costs. See *Butterworth* v. Lord *Le Despenser*, 3 *M.* & *S.* 150.

(*a*) 3 *Burr.* 1788.

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less ought to treat it as a sham demurrer, and as an evasion of the Judge's order.

Chitty, in support of the rule, submitted that a misjoinder of counts is a defect in substance and not merely in form, and that though the defendant might have availed himself of the objection on a general demurrer, yet the mere circumstance of his pointing out, particularly by a special demurrer, such substantial objection, could not vitiate the demurrer or prevent its being considered as an issuable plea within the terms of the order.

ABBOTT Ch. J. Though this is not a general demurrer, yet the objection to the declaration specially assigned as cause of demurrer is an error in substance, and therefore the demurrer must be deemed an issuable plea within the meaning of the order, and the plaintiff ought not to have treated it as a nullity.

HOLROYD J. and BEST (a). were of the same opinion.

Rule absolute.

(a) *Bayley* J. was absent.

BANTER *against* LEVI.

Monday, Nov. 29th.

If a sheriff's officer be put in as bail, the plaintiff must except to the bail, and cannot proceed as if the matter were a mere nullity.

COMYN shewed cause against a motion for setting aside the proceedings on the bail bond in this cause, on the ground that a sheriff's officer had become bail above, which he contended was contrary to the practice of the Court. He admitted that no exception had been entered against the bail.

Adolphus, in support of the rule, contended that the practice of this Court was now clearly settled; that a

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sheriff's officer is good bail unless he is excepted to, and the plaintiff cannot treat the proceedings as a nullity. It was held, *Rex* v. *The Sheriff of Surrey*, (a)

It is no objection to bail, that they are indemnified by the sheriff's officer.

(a) 2 *East*, 181, in K. B. *aliter* in C. P. *Jackson* v. *Hillas*, cited 1 *Taunt.* 162, 3; *Tidd*, 6th ed. 252. It is no objection to bail that they are indemnified by the sheriff's officer. *Chick's* bail. *Mich.* T. 56 *Geo.* 3, *Nov.* 17, 1815. *Espinasse* moved to justify bail. On examination, the bail admitted that they came at the request of, and were indemnified by the sheriff's officer, who had arrested the defendant, and taken a bail bond. *Lawes*, in opposition, contended that it was contrary to the rule of Court, and instanced the case of attornies. *Espinasse* in reply, admitted that an officer could not be bail, nor a sheriff's officer; but observed that attornies were prohibited from indemnifying persons in becoming bail by a particular rule of Court, in which sheriff's officers were not mentioned, nor did this case apply to them. *Dampier* J. said it was no objection, and was not within the rule of Court; and that the officer who took the bail bond having a certain responsibility if bail was not regularly put in, had a right to put in bail for his own indemnity. Bail justified.—N. B. *Bayley* J. had decided in the same way two days before. An attorney who had not practised for six years was allowed to justify as bail. *Anon. East.* T. 1815, *May* 16. One of the bail had been an attorney, but had not practised or renewed his certificate for six years. *Abbott* J. Permitted him to justify. It is a rule of Court, that no attorney shall be bail in any action or suit depending therein, *R. M.* 1654, *s.* 1; *R. M.* 14 *Geo.* 2, reg. 1 K. B. *Doug.* 466, note 1; The *King* v. The *Sheriff* of *Surrey*, 2 *East*, 182. But an attorney or his clerk has been allowed to become bail in order to surrender the defendant immediately without justification. *Per Cur. M.* 42 *Geo.* 3, K. B.; *Tidd*, 251, 6th ed.; Vide *Jackson* v. *Hillas*, 1 *Taunt.* 162, 164.

An attorney, who has not practised for six years, justified as bail.

An attorney may be put in as bail, but cannot justify.

See *Anon. Trin.* T. 1813, *June* 30th. *Bail* were opposed on an affidavit that one of the persons who had become bail was a attorney. *Bayley* J. at first intimated, that in this Court the objection did not apply to an attorney who was not concerned in the same cause, although the ground of objection was more general in the Common Pleas. *Comyn*, *amicus curiæ*, suggested that the rule was, that no attorney could justify in this Court, but he might be put in as bail. An attorney is allowed to be put in as bail, but cannot justify. The learned Judge granted time.

An attorney is liable to an action on his recognizance of bail, though contrary to the rule of Court that he should be bail at all; but he is nevertheless entitled to his privilege to be sued as an attorney.

An attorney however is liable on his recognizance when it is entered into, although it is contrary to the rule of Court that he should be bail at all. *Harper* v. *Tahourdin*, *T.* T. 1817. Action against an attorney on a recognizance of bail. Plea in abatement, privilege of defendant as an attorney to be sued by bill. Demurrer assigning for cause that the defendant was estopped from pleading his privilege by entering into the recognizance. *Curwood*, for the plaintiff, contended that an attorney who had acted contrary to the rule of Court against attorneys becoming bail, had thereby waived his privilege, and could not claim to be privileged when an action was brought against him as bail. And urged that the privilege of an attorney was not part of the common law, as there was no such officer originally by common law, for no person could at first appoint his attorney without

that if the defendant's attorney or his clerk be put in as bail, the plaintiff must except to the bail, and cannot proceed as if the matter were a nullity. 1819. BANTER *against* LEVI.

The COURT assenting, the rule was made absolute.

leave granted under the great seal, till the statute of *Merton*, and that was confined only to particular Courts. 4 *Hen.* 4, *c.* 18, *Gilb.* Prac. Com. Pleas. *Bayley* J. asked if there was any case in which it was held, that by entering into recognizances he forfeited his privilege. *Curwood* said not; he said there was a case in *Barnes*, *How* v. *Bridgewater*, p. 117, which bears upon the point. Lord *Ellenborough* Ch. J. referred to the rule of Court, and said that rule was formed to protect the attorney; and in looking at it he said it was also prohibitory, and therefore he might be proceeded against upon that prohibition; but still that does not prevent him from continuing liable according to the recognizance he had entered into. *Bayley* J. The privilege which the attorney claims, is the privilege of his clients. *Per Curiam.* He is certainly liable upon his recognizance, whatever penalties he may be liable to for having acted against the rule of the Court. But still he is entitled to his privilege to be sued as an attorney. *Chitty* for the defendant, for whom the Court gave judgment on demurrer.

DAVISON *against* MORETON.

Monday, *Nov.* 29th.

The general issue is a plea that may be filed, and when that takes place the plaintiff cannot sign judgment as for want of a plea; and the affidavit for setting aside a judgment, on the ground that a plea was previously filed, need not state in what place it was filed, for the Court will presume it was filed in the right place, unless the contrary be shown; Held also, that the plea of *not guilty* to an action of *assumpsit* cannot be treated as a nullity. (*a*)

CAMPBELL on a former day obtained a rule to shew cause why the interlocutory judgment signed in this case should not be set aside with costs for

(*a*) The general issue may be either delivered to the plaintiff's attorney, or entered in the General Issue Book kept by the Clerk of the Judgments. Rule, *Trin.* 5 & 6 *Geo.* 2, note *b*, K. B.; *Tidd*, 6th ed. 712. So in C. P. it may be filed at length, with the prothonotaries. *Tidd*, 713. As to what pleas must be delivered and not filed as *comperuit ad diem*, bankruptcy, &c. *Rowsell* v. *Cox*, *ante*, 211; *Henderson* v. *Sansum*, *ante*, 225.

The question as to the right to sign judgment for want of a plea where a bad plea is pleaded, is in part discussed, *Phillips* v. *Bruce*, *ante*, 526; *Bill* v. *Alexander*, *ib.*; *Anon. ante*, 355. If not guilty be pleaded in *assumpsit*, the proper course is to demur; the plea would be aided after verdict. *Marsham* v. *Gibbs*, 2 *Stra.* 1022. In *Robinson* v. *Green*, 1 *Stra.* 574, *non assumpsit* was pleaded in action of *tort* against a carrier, and held good after verdict. The Court said, "it was well enough; the undertaking to

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irregularity; the irregularity being, that the judgment was signed at the time there was a plea in the office. The affidavit upon which the motion was made, stated that the plea of the general issue had been filed with the clerk of the judgments at the time that judgment was signed, but it did not state in what place it was filed.

E. Lawes now shewed cause against the rule, and contended that it was quite contrary to the prac-

carry was the gist of the action, and as in *assumpsit* you may plead not guilty, as was done in *Coggs* v. *Bernard*, *Salk.* 26, as appears by the record at the end of the book, p. 733, so in the case of a *tort* founded on an agreement, *non assumpsit* will be sufficient, because it tries the merits as much as not guilty could have done." See also *Hayne* v. ——, *Hil.* T. 1816, *June* 26th. *Lawes* moved to set aside an interlocutory judgment. The action was in case against coach proprietors, for not safely carrying the plaintiff's wife and child. The declaration stated that the plaintiff's wife and child offered themselves to go by the coach and were accepted. The defendant pleaded *non assumpsit*. The plaintiff treated the plea as a nullity, and signed judgment. The case of *Robinson* v. *Green*, 1 *Stra.* 574, was relied upon to shew that the plaintiff could have no right to sign judgment as for want of a plea. Lord *Ellenborough* Ch. J. observed, that it might be a question whether there was any undertaking in this case. The Court granted a rule *nisi* to set aside the proceedings for irregularity. And *per Curiam*. As the rule is moved with costs, if it should be discharged it will be discharged with costs.

If *non assumpsit* be pleaded to an action on the case against a coachmaster for not safely carrying the plaintiff's wife and child. *Semb.* that the plaintiff cannot sign judgment as for want of a plea.

But judgment may be signed for want of a plea, if *non assumpsit* be pleaded in debt. 6 *East*, 549, *Perry* v. *Fisher*, *Taylor* v. *Capper*, 14 *East*, 442; 4 *Taunt.* 164; or *nil debet* in *assumpsit*, *Barnes*, 257. But see *Hardw.* Rep. 179. Though it has been observed that *nil debet* expresses the meaning of the general issue in *assumpsit* better than *non assumpsit* itself. 4 *Taunt.* 164. *Per Mansfield* Ch. J. If a plea which is pleaded partly in abatement and partly in bar, be put in after the four days allowed for pleading in abatement, it seems that the plaintiff may sign judgment, *Martindale* v. *Harding*, *Mich.* T. 1817, *Nov.* 28. *Cross* shewed cause against a rule obtained by *Chitty*, for setting aside judgment. Declaration delivered *Nov.* 10th. Plea partly in abatement and partly in bar, filed *Nov.* 15. Judgment signed, because plea in abatement was not filed within four days. The plea was partly in abatement to one count, and in bar to the others. It was therefore necessary to sign judgment generally. *M'Donnell* v. *M'Donnell*, 3 *Bos. & Pul.* 174. *Chitty*, contra, cited *Powell* v. *Fullerton*, 2 *Bos. & Pul.* 420. *Sed per Abbott* J. What answer can be given to 3 *Bos. & Pul.* 174? that is a later case. Eventually it was agreed that the pleas should be withdrawn on terms.

If a plea, partly in abatement and partly in bar, be put in after the four days, quære if the plaintiff may not sign judgment for want of a plea.

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tice of the Court to file the plea of the general issue, and consequently that the plaintiff was well entitled to sign judgment as for want of a plea. The affidavit on the other side, at all events, did not state the place where the plea was filed, and the Court would not assume the fact that it was filed in the right place, unless it appeared in the affidavit. [BAYLEY J. If there is a right place and a wrong one, the Court will assume that it is filed in the right one, unless you shew that it is filed in the wrong.] There is no such thing as filing a plea of the general issue. [BAYLEY J. You are not bound to enter it in the book, you may file it with the clerk of the judgments.] The Court a short time since held, that the plea of *comperuit ad diem* ought to be delivered. (*a*) [ABBOTT Ch. J. Here the plea might lawfully be filed, there it could not; and that is the difference between the two pleas.] When the defendant comes to the Court upon an irregularity, he is to shew what the irregularity is. [ABBOTT Ch. J. He points out the irregularity, by shewing that the judgment is signed after a plea filed. That plea, according to the practice of the Court, may be filed; and if you mean to say that it is filed in the wrong place, you may shew that it is, we wont presume that it is.] But the plea filed, is a plea of *not guilty* to an action of *assumpsit*. Now without the aid of a verdict, this is no plea at all. [ABBOTT Ch. J. If it is a wrong plea you may demur to it.] [BAYLEY J. A plea of *not guilty* to an action of debt on a penal statute, is not a nullity (*b*). In *Gilbert* C. P. it is said, that they used to plead not guilty to an action of *assumpsit*, for they considered fraud as part of the action. A plea may be bad, but it does not therefore follow that it is

(*a*) *Rowsell* v. *Cox*, *ante*, 211, and note; and see *Henderson* v. *Sansum*, *ante*, 225.

(*b*) *Coppin* v. *Carter*, 1 T. R. 462; *Com.* Dig. Pleader, 2 S. 11; 2 S. 17.

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no plea.] If the general issue may be filed, nothing further can be offered in this case.

Rule absolute.

Monday, Nov. 29th.

HARRIS *against* WHITECHURCH.

It is not necessary to serve a copy of the rule for a *concilium* upon the defendant's attorney, in a case where no argument is intended, and an erroneous copy of a rule is to be considered as no copy. (*a*)

CAMPBELL on a former day obtained a rule to shew cause why the final judgment signed, and the writ of execution issued in this cause, should not be set aside for irregularity. It was a writ of error from the Common Pleas to this Court, and the defendant in error obtained a rule for a *concilium* for *Friday* the 19th of *November*; a copy of this rule was served on the attorney of the plaintiff in error, but by mistake in filling up the copy, the clerk inserted *Tuesday* the 23d, instead of *Friday* the 19th. The mistake was not discovered, and there being no argument, and as none was intended, the defendant in error signed judgment, and issued a writ of execution; and the question was whether this was an irregularity.

Reader now shewed cause and contended, that the judgment was regularly signed. The plaintiff could

(*a*) In *Imp.* K.B. 337, it is said that the master, on being referred to, was of opinion that the rule for a *concilium* ought to be served where there is a real demurrer. Rule, *Mich.* 30 *Geo.* 2; and in practice it is usual to serve a copy of the rule on the defendant's attorney, *Tidd*, 792; but in *Forbes* v. Lord *Middleton*, 2 *Stra.* 1242, the Court held that it was no irregularity that the rule for the *concilium* had not been served, nor any notice given of putting the cause in the paper, for it was the duty of the defendant to search, as he must expect the plaintiff to proceed; and the Court refused to set aside the judgment. The motion for the *concilium* at the present day is a motion of course, requiring only counsel's signature. *Tidd*, 791. If the plaintiff deliver a demurrer book differing from the declaration, the defendant should return it, and not suffer it to be put down; but in such a case the Court allowed the books to be amended, so as to correspond with the declaration, on the defendant paying the costs, swearing to merits, and giving judgment of the Term. *Hewett* v. *Blossom*, *Trin.* T. 1816. *June* 28th.

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HARRIS *against* WHITE-CHURCH.

not complain that he had sustained any injury by the proceeding, for he did not pretend that there was any real error. A rule for a *concilium* had been obtained, and the case had been set down in the common paper for *Friday* the 19th, no argument being intended. The plaintiff's attorney was not bound to serve the defendant's attorney with a copy of the *concilium*, where there was no argument; and in this case it was merely done as matter of courtesy. If the defendant could shew that he had sustained any inconvenience, or that he was at all misled by the mistake complained of, the case might be different; but as there was no suggestion of that kind, the Court must discharge the rule with costs.

Campbell, in support of his rule, contended that he was not bound to shew substantial error. It was sufficient for the purpose of this motion, that the plaintiff had served the rule for the *concilium* to argue on *Tuesday* the 23d instant, and that instead of waiting for that day, he signed judgment on the *Friday* preceding; but

The COURT said, that it was not necessary to serve the defendant with the rule for the *concilium*, in cases where no argument was intended. If the party here had made an affidavit, that in consequence of being served with a mistaken rule for a *concilium*, he had been prevented from instructing counsel to argue the case, then the Court might entertain this application; but in the absence of any such affidavit, shewing even the semblance of an argument, or that the defendant had sustained any injury by the inadvertence of the attorney's clerk, the application must fall to the ground.

Rule discharged with costs.

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Monday, Nov. 29th.

THOMPSON *against* CAREY.

When a defendant renders in discharge of his bail, after a declaration has been filed conditionally and notice served upon him, and rule to plead given, it is not necessary to deliver another declaration for the defendant in custody. (*a*)

COMYN shewed cause against a rule obtained by *Reader* on a former day, for setting aside the interlocutory judgment signed in this cause, and all subsequent proceedings, for irregularity, with costs, under these circumstances. In this bailable action, the plaintiff declared *de bene esse* against the defendant, and ruled him to plead, he being then at large. The defendant put in bail and gave notice of justification, but his bail did not justify, and on the 15th inst. he surrendered in discharge of his bail. On the 19th a regular demand of a plea was served upon him in prison, which he delivered to his attorney, and on the 22d he was served with a notice for executing a writ of inquiry. The question was, whether when a defendant renders in discharge of his bail, after declaration filed and rule to plead given, it is necessary to deliver another declaration to the marshal. In point of practice he submitted that it was not necessary. It was expressly laid down in *Tidd's* Prac. 350, that a declaration against a defendant at large upon bail is good, although a bill has not been filed, because if the bringing of a writ of error, or any other reason, make the filing of a bill necessary, it may be filed at any time. (*b*) There is a distinction where a defendant is rendered before declaration, and where he is rendered after. When he renders before declaration, then the plaintiff has a full Term after the render, to declare; but when the render is after declaration, then his time for proceeding to final judgment is limited to three Terms. (*c*)

(*a*) Vide *Williams* v. *Scudamore*, *ante*, 386. See rule, *East.* T. 5 *W.* & *M.* Reg 3; and *Hil.* T. 26 *Geo.* 3.

(*b*) *Wicker* v. *Woodhall*, *Sayer's* Rep. 49.

(*c*) *Tidd*, 6th ed. 359, 360.

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THOMPSON *against* CAREY.

ABBOTT Ch. J. The master reports that there has been a recent decision, in which it was held under circumstance like these, that it was not necessary to deliver a fresh declaration. It seems to be reasonable, that it should not be required under such circumstances. The rule in the Common Pleas is, I believe, different from that in this Court. There does not seem to be any good reason for delivering a declaration to the marshal, or the defendant in custody, if a declaration has been well delivered before the defendant went to prison.

Rule discharged with costs.

TURNBULL *against* MORETON.

Monday, Nov. 29th.

Where an attachment issued against the sheriff for not taking a bail bond, the Court on motion of the defendant refused to set aside the attachment on any terms; but upon an affidavit of merits, they let him in to defend, ordering the attachment to stand as a security. (*a*) Affidavits sworn before a Justice of the Peace in *Scotland*, are admissible in a cause in this Court, if the hand-writing of the Justice be authenticated. (*b*)

THIS was a motion to set aside a regular attachment against the sheriff, on payment of costs.

Marryatt now shewed cause against the rule, and objected, in the first instance, that the affidavits on which the motion was made, were not admissible, for that they appeared to have been sworn at *Glasgow*, before "one of His Majesty's Justices of the Peace for the town and county of *Lanark* in *Scotland*," and a Justice of the Peace in *Scotland* has no authority to administer oaths in a civil suit in this Court.

The COURT said that this was no objection to the affidavits, if the hand-writing of the Justice be authenti-

(*a*) See the *King* v. the *Sheriff* of *London*; in *Tood* v. *Jacob*, *ante*, 68; and see *ante*, 567, and note. See the next case.

(*b*) The practice is stated in 1 *Sellon's* Prac. 1st ed. 111. It is there also said, "that the person upon his arrival in *London* must make affidavit, that the former affidavit of the defendant was made by the plaintiff; but this seems unnecessary, and it suffices to swear to the hand-writing of the magistrate."

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TURNBULL *against* MORETON.

cated. Affidavits sworn before a commissioner, or other competent authority in *France*, had been held to be admissible in this Court, when the hand-writing of the functionary was duly attested. (*a*)

Marryatt then insisted that the attachment was regular, it appearing that the sheriff had not taken any bail bond; and he contended, therefore, that the attachment could not be set aside on any terms.

Campbell contra. The affidavits state that the omission to take the bail bond was attributable to a mere mistake, and there is no general rule which forbids this application on that ground. (*b*) It is sworn that this motion is made without any collusion with the sheriff, that it is made by the defendant only, and that he has merits.

ABBOTT Ch. J. The sheriff has neglected his duty in omitting to take a bail bond. If this is the fact, the utmost we can do is to let you in to defend the action, and let the attachment stand as a security.

Rule absolute on these terms.

(*a*) Vide *Thurlt* v. *Faber*, *ante*, 463.
(*b*) But see the *King* v. the *Sheriffs* of *London*, *ante*, 68. and *Fuller* v. *Prest*, 7 *T*. R. 109.

Monday, Nov. 29th.

The KING *against the* SHERIFF *of* MIDDLESEX, *in a cause of* HEPPER *against* LEVI.

The Court will set aside a regular attachment against the sheriff upon payment of costs, on the production of an affidavit of merits by the defendant himself. (*a*)

ABRAHAM, on a former day, moved to set aside a regular attachment against the sheriff, upon payment of costs; but the Court then refused the motion without an affidavit of merits. (*a*) He now renewed his motion upon an affidavit of merits made by the defendant's brother, the defendant himself being abroad in the *West Indies*.

(*a*) Reg. Gen. *Mich.* 59 *Geo.* 3, *ante*, 128; *Bell* v. *Taylor*, *ante*, 572; *Phillips* v. *Whitehead*, *ante*, 270.

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THE KING *against* THE SHERIFF OF MIDDLESEX, IN A CAUSE OF HEPPER *against* LEVI.

Comyn resisted the rule, and contended that it was necessary the defendant himself should swear to merits before he could entitle himself to the indulgence prayed by this affidavit.

Merits cannot be sworn to in such a case by a third person: (*b*) but on bringing the money into Court the defendant will be allowed to try the cause.

The COURT said, that this was certainly necessary, but they would permit the defendant to be let in to try the cause, on bringing the money into Court, within a week, and take short notice of trial for the Sittings after this Term; otherwise the rule to be discharged with costs.

(*b*) But in K. B. an affidavit to hold to bail may be made by a third person. *King* v. Lord *Turner*, *ante*, 58; or an affidavit of the truth of a plea in abatement, *id. ibid.*

THE KING *against* C. D.

Monday, Nov. 29th.

The rule for an attachment for non payment of costs, pursuant to the Master's *allocatur*, is absolute in first instance, although four years have elapsed since the taxation.

CHITTY moved to set aside the attachment in this case, under the following circumstances:—Costs were taxed in an ejectment cause against the defendant, for not confessing lease, entry, and ouster under a consent rule in *Trinity* Term 1815, and the Master having made his *allocatur*, an attachment was, on *Saturday*, the 27th instant, moved for against the defendant for non payment of costs, and it was made absolute in the first instance. The motion was now made to set aside that attachment; and it was submitted, that the common law rule which precludes the plaintiff from taking out execution upon a judgment after a year and a day have elapsed, without first issuing a *scire facias*, was applicable to this case, (*a*) because the Master's *allocatur* was analogous to a judgment, and the attachment thereon to an execution; (*b*) and that the plaintiff

(*a*) *Tidd.* 6 ed. 1113-4; 3 *Bla.* C. H. 421.
(*b*) See cases *Tidd.* 6th ed. 375, n. *b.* 2 *Bar. & Ald.* 589.

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THE KING *against* C. D.

should have moved for a rule *nisi* instead of a rule absolute in the first instance.

The COURT granted a rule to shew cause at Chambers why the attachment should not be set aside; *W. E. Taunton*, in support of the attachment, and *Chitty* contra, were heard upon this case: and after directing an inquiry of the Clerk of the Rules with respect to the practice of issuing an attachment after the expiration of a year from the time when the costs were taxed,

HOLROYD J. held that the proceedings were regular, and that it was not necessary to move for a rule *nisi* after the expiration of a year. That the common law rule, precluding a plaintiff from issuing an execution after a year and a day from the time a judgment is signed, is not applicable to a case of this nature, nor was it affected by the stat. *West.* 2 (13 *Edw.* 1), which gives a *scire facias*, to revive a judgment in order to proceed to execution. That in the case of a judgment, the plaintiff could, if he thought fit, issue execution immediately, whereas an attachment could not be issued without personal service of the rule upon the defendant, who, by absenting himself, might prevent the plaintiff from proceeding by attachment within the year.

Rule discharged with costs.

Monday, Nov. 29th.

DERRY *against* LLOYD.

The defendant is entitled to particulars before appearance, and an order for particulars, with a stay of proceedings, will prevent the plaintiff from signing judgment, although the summons for particulars was in an action for assault, in which no order for particulars could properly be made. (*a*)

MOTION to set aside interlocutory judgment for irregularity. On the 8th of *October*, before the defendant had entered an appearance, the latter took out a summons for the plaintiff to deliver a particular

(*a*) In the King's Bench a summons for particulars may be taken out

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of his demand, the action being for an assault; and on the morning of the 9th, the summons was served upon the plaintiff's attorney, and on the evening of that day the latter delivered a particular to the defendant's attorney, without having attended the summons. No appearance was entered for the defendant until the 15th, and on the 20th the plaintiff signed judgment for want of a plea, before the summons for a particular was taken out.

Campbell, on a former day, obtained the present rule for setting aside the judgment for irregularity, the irregularity complained of being, that the Judge at chambers had made an order for a particular to be delivered, and that in the mean time proceedings should be stayed.

Walford now shewed cause against the rule, and contended that the judgment was regularly signed, for

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before appearance or declaration. *Imp.* K. B. 8 ed. 233; *aliter* in C. P. 3 *B. & P.* 378. *Tidd.* 621. After the bill of particulars has been delivered, the defendant in the King's Bench has the same time to plead as he had when the summons for it was returnable. *Mowbary* v. *Schuberth*, 13 *East*, 508. It has been held, that the particulars of demand cannot in general be required before declaration. *Chapman* v. *Anning*. 5 *Mich.* 169. *Eas.* T. 1814, *May* 7. *Tindal* moved to stay proceedings on the bail bond which had been assigned. The plaintiff in the original action had neglected to give particulars of demand, in pursuance of the Judge's order or summons. But it appeared that no declaration had been filed before the order for the particulars was obtained. And *per Dampier* J. "I do not see how the particulars of demand could be demanded before the declaration. I know it is sometimes done, but I think it irregular, and I never grant it myself. I think, as it is a point of general practice, it had better be mentioned when the Court is full. The Judge's order appears to me to have been improvidently issued, and therefore the not giving the particulars is excusable. To some declarations it would be almost impossible to give in particulars."—It seems more reasonable that the defendant should be allowed to require particulars of demand before appearance, than to compel him to wait until after declaration. The object of particulars is to ascertain for what debt or demand the plaintiff is proceeding; and if that be disclosed, the defendant may then pay the debt and costs, without incurring the additional expence of appearance and declaration.

Particulars of the plaintiff's demand should not be demanded before the declaration is delivered.

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DERRY *against* LLOYD.

that a defendant cannot demand a bill of particulars till after appearance. *Kitchin* v. *Blanchard* (*a*); but in all events, he said that the plaintiff having complied with the object of the summons, by delivering a bill of particulars in the evening of the day on which the summons was taken out, he was entitled to proceed.

Campbell, in support of his rule, said he was not instructed that any particulars had been delivered, nor did the affidavit on the other side state when and where they had been delivered; but he rested this motion upon the fact not disputed, that the Judge at chambers had made an order, "That the plaintiff's attorney, or agent, shall deliver to the defendant's attorney or agent, an account and particular in writing of the demand for which this action is brought, and that in the mean time proceedings shall be stayed." It might be true that no particular could be delivered in an action for assault, but that would only be a ground for shewing cause against the order before the learned Judge. The plaintiff, however, had never attended the summons; and it was not until two other summonses were served, both of which the plaintiff's attorney had disregarded, that the learned Judge had made the order in the terms mentioned. [BEST J. The Judge could hardly have been informed of the nature of the action, for if he had, he certainly could not have made an order for a bill of particulars in an assault cause.] The learned Judge, however, having been pleased to make an order of that kind, and that in the mean time procedings should be stayed, the defendant ought to have the benefit of it, particularly as the plaintiff's attorney did not think proper to shew cause against the order. The order was a stay of proceedings, and in the face of it the plaintiff had gone on. As to the objection that the defendant had not appeared, he need not ap-

(*a*) 1 *Bos. & Pul.* 378; *Tidd*, 6th ed. 621.

pear until he has actually obtained the particular, since the particular, when obtained, may afford a reason for not proceeding in the action, if the demand appeared to be just.

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ABBOTT Ch. J. Let the judgment be set aside without costs.

Walford suggested that the defendant did not swear to merits.

ABBOTT Ch. J. That is not necessary, if by mistake the defendant is excluded the benefit of a trial. Under the circumstances stated, I think we ought to set aside the judgment without costs.

Rule absolute without costs.

BULLMAN *against* CALLOW.

Monday, Nov. 29th.

Affidavits entitled *A. B.* and others, against *C. D.* (without setting out the names of all the plaintiffs in the cause) cannot be read in shewing cause against a rule, but the Court refused to make the rule absolute with costs upon such an objection. (*a*).

ON shewing cause against a rule in this case, for setting aside a judgment and execution on the bail bond, affidavits were produced by the plaintiff, entitled

(*a*) *Tidd*, 6th ed. 518. The christian names and surnames must be inserted in the title of the affidavits produced on shewing cause. *Fores* v. *Diemar*, 7 T. R. 661. So motions and affidavits for attachments must be entitled with the names of the parties before the rule for the attachment is granted, and afterwards the king is to be named as the prosecutor. *Whitehead* v. *Firth*, 12 *East*, 166; *Wood* v. *Webb*, 3 T. R. 253; The *King* v. *the Sheriff of Middlesex*, 7 T. R. 439; 2 *Bos.* & *Pul.* 517, a. *Etherington* v. *Kemp* and others, *Mich.* T. 1814. *Burrough* on a former day had obtained a rule to shew cause why an attachment issued against the sheriff for not bringing in the body, should not be set aside, on the ground that the affidavit on which the attachment was obtained was insufficient, because the title thereof did not state the names of all the parties in the cause; and *Taddy* now shewed cause, contending, that as the title to the affidavit corresponded with the rule for the attachment, which was entitled *Etherington* v. *Kemp*, the defect was cured. But *Bayley*, J. said, that it had been before decided that it would not do. *Anon. Mich.* T. *Nov.* 28. *Tindal* having on a former day obtained a rule to shew cause why the service of a writ should

Affidavits in support of the rule for an attachment against the sheriff for not bringing in the body, must be entitled with the names of all the parties to the suit, and though the affidavits correspond with the rule for the attachment; yet if all the parties be not inserted in the affidavits, the court will set aside the attachment.

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BULLMAN *against* CALLOW.

"In the cause of *Bullman* and others against *Callow*," without specifying the names of the other plaintiffs on the record.

Comyn, who had obtained the rule, objected that these affidavits could not be read, for being so imperfectly entitled; and the Court having acquiesced in the objection, he prayed that the rule might be made absolute with costs; but

The COURT said they would not allow costs where the rule went off upon a mere objection to the title of the affidavits.

Rule absolute without costs.

Reader for the plaintiff.

Affidavit in support of rule to set aside service of writ for irregularity in an action against three, on the ground that the attorney's name is not indorsed on the process, must be entitled with the names of all the defendants.

not be set aside on the ground that the name of the plaintiff's attorney was not indorsed thereon. *Comyn*, on shewing cause, took an objection to the affidavit on which the rule had been obtained, on the ground that it was only entitled as in an action against one defendant, when in fact, there were three; and this he contended was a fatal objection. *Tindal*, *contra*, said, that the action was, in fact, against only one defendant, and that this was a very strict objection. *Bayley* J. The objections are both of equal merit, and the rule must be discharged with costs. Rule discharged accordingly. In *Dand* v. *Barnes*, 6 *Taunt.* 5; 1 *Marsh.* 403, S. C. *Mackensie* v. *Martin*, 6 *Taunt.* 286. it was held, that if a plaintiff joins several defendants in one common process, and one of the defendants who is irregularly served, applies before declaration to set it aside, he may entitle the rule and affidavit in a cause between the plaintiff and himself only, the other defendants not having been brought into Court; and the Court instanced the case of *Richard Roe*, who is joined with the defendant in every common process, and yet need not appear to warrant a motion by the real defendant. But it is a general rule, that when a cause is depending, the affidavits must be entitled with the christian and surnames of all the parties. *Owen* v. *Hurd*, 2 T. R. 644; *Noel* v. ——, 1 *Smith*, 457; *Fores* v. *Diemar*, 7 T. R. 663; *Tidd.* 6th ed. 518; and the character in which they are sued, and an ambiguity in the title, as styling the plaintiff "assignee," without saying of whom, or giving any further explanation is fatal, 3 *Taunt.* 377. *Steyner* v. *Cottrell*. See a reason assigned, *Prince* v. *Nicholson*, 5 *Taunt.* 337.

1819.

WILLIAMS *against* REEVES.

Monday, Nov. 29th.

Where a writ of inquiry was sought to be set aside on the ground of excessive damages, the Court imposed the terms of bringing part of the damages into Court, before they granted a rule to shew cause (*a*).

J. EVANS moved to set aside the writ of inquiry executed in this case on *Saturday* last, on the ground of excessive damages. It was an action for two assaults committed on two successive days, and though the personal suffering of the plaintiff was very trifling, the jury gave 250*l.* damages.

The COURT granted a rule to shew cause, on the terms of bringing a hundred pounds into Court; saying, that the plaintiff ought not to be prejudiced by the long interval which must occur before cause could be shewn against the rule.

Evans took the rule to shew cause, upon these terms.

(*a*) In *Pleydell* v. *the Earl of Dorchester*, 7 T. R. 529, which was an action for diverting a watercourse; the Court granted a new trial on the ground that the damages given greatly exceeded the amount of the injury proved; but they directed that the former verdict should stand as a security in the meantime, for the damages which might be recovered on the second trial. The instances of applications for setting aside inquisitions on account of excessive damages, are, 2 *Leon.* 214; 3 *Leon*, 117, S. C.; 3 *Burr.* 1846; 3 *Wils.* 63; 11 *East*, 23; *Tidd*, 6th ed. 611. 931.

EX PARTE DAVIS.

Monday, Nov. 29th.

An attorney who has taken out his certificate for one year, but has never practised, is entitled at any subsequent time to be re-admitted without fine (*a*).

CASBERD moved to re-admit this gentleman as an attorney of the Court, upon payment of a small fine, on an affidavit stating that he had been admitted three years since, but had never practised.

THE COURT said, that the gentleman was entitled to

(*a*) This point may now be considered as finally settled. See *Ex parte Richards*, *ante*, 101.

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Ex Parte Davis.

be re-admitted without any fine whatever, as he had never practised. A fine was never imposed unless there were arrears of duty.

Casberd said that the practice was otherwise in C. P.

Re-admitted without fine.

Monday, Nov. 29th.

Taylor *against* Gilkes.

Where a cause is removed by the defendant from an inferior Court, and in the mean time a witness goes abroad, on account of which the defendant applies to put off the trial, he must bring the money into Court as a condition of the postponement (*a*).

DEHANY shewed cause against a rule for putting off the trial of this cause from the Sittings after this Term, until the Sittings after next *Easter Term*. The action was originally brought in the Palace Court, and the defendant removed it into this Court; and in the mean time his witnesses, who were seamen, had gone abroad. This motion was made to put off the trial on the ground of the absence of those witnesses.

The Court said they would put off the trial, but it must be upon the terms of bringing the money into Court, which was but reasonable, because the defend-

An affidavit that a material witness is not likely to return till a day mentioned, impliedly swears that he is expected then.

(*a*) So the Court will not put off the trial at the instance of the dedefendant, on account of the absence of a material witness, after he has pleaded a sham plea, by which a trial has been lost, unless he will pay the money into Court. *Stockton* v. *Hodges*, *Tidd*, 827. See *Saunders* v. *Pittman*, 1 *Bos.* & *Pull.* 33. The affidavit should state at what time the witness is expected to return. See, *ante*, . But it seems that an affidavit stating that the witness is not expected to return till a particular day, is sufficient, because it sufficiently conveys, that the witness is expected at that time. *Anon. Trin.* T. 1816, *July* 3d. *Scarlett* on a former day had obtained a rule to shew cause why the trial should not be put off, on an affidavit that a material witness in the cause was absent, and was not under circumstances (stated in the affidavit) likely to return till a certain day. *Gifford* now shewed cause, and contended that the affidavit was insufficient, on the ground that it did not positively state that the witness was expected to return on the day therein mentioned. *Sed per Lord Ellenborough*, Ch. J. An affidavit that a material witness is not likely to return until such a day, is an implied assertion that he is expected to return then, and such an assertion upon which perjury could be assigned. *Per Curiam.* Rule absolute.

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ant had by his own act prevented the trial from taking place, until an event occurred which made it necessary for him to apply to this Court.

Rule absolute on those terms.

Marryatt for the defendant.

HUNTER *against* CAMPBELL.

Monday, Nov. 29th.

A bond given by a member of parliament, under 4 *Geo.* 3, *c.* 33. for paying the debt and costs absolutely if the plaintiff succeeds, is analogous to a recognizance of bail in error, and the Court refused on that ground to order such a bond to be delivered up to be cancelled, where after the action was commenced, the defendant became bankrupt and obtained his certificate, although that might be a good plea, *puis darrein continuance.*

THE defendant, a Member of Parliament, carrying on business as a merchant, being sued by the plaintiff in 1818, entered into a bond required by 4 *Geo.* 3. *c.* 33. Since the commencement of the action he had become bankrupt, and had obtained his certificate, although he had not yet pleaded his certificate to the action; and the cause was set down for trial, and now stood in the Chief Justice's paper for the Sittings after the present Term. Under these circumstances—

Wylde on a former day obtained a rule to shew cause why the bond, so entered into by the defendant, should not be delivered up to be cancelled, on the ground of its analogy to a bail bond given by persons not having privilege of Parliament, which became void by the bankruptcy and certificate of the defendant; contending in this case, that the bond given by the defendant could never be a security to the plaintiff, inasmuch as the certificate would be an answer to the action.

Campbell now shewed cause against the rule, and contended, that there was no analogy between a bond given by a Member of Parliament in lieu of bail under the 4 *Geo.* 3. *c.* 33. and the common recognizance of bail in ordinary cases; for in the latter, the defendant

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may be rendered; and when in such cases the bail become exonerated by the bankrupt's certificate, it is on the ground that bankruptcy is the same as a render; but in the former the same rule does not apply, because in fact, the defendant cannot be rendered. The bond in this case is like the bail bond in error, where the bail cannot render their principal, but are absolutely bound to pay the debt and costs if the plaintiff succeeds. Here the condition of the bond given by the defendant is, that he *shall* pay such sum as shall be recovered in the action, together with such costs as shall be given in the same; and the circumstance of the defendant having obtained his certificate, is no ground for the interference of the Court. If the plaintiff succeeds in the action, inasmuch as there can be no render, he is entitled to recover the condemnation money and the costs; but if he does not succeed, then the defendant and his sureties are in no danger. Assuming the bond given here to be analogous to that of a recognizance of bail in error, it is clear that the certificate will not avoid the bond; for in the latter case it has been held, that as bail in error cannot surrender the principal, they are not entitled to relief though the principal become a bankrupt pending the writ of error; for by Statute 16 and 17 *Car.* 2. *c.* 8. bail in error are liable in all events in case judgment is affirmed. *Southcote* v. *Brathwaite* (*a*). The case cited seemed to be exactly analogous to that under consideration. But there is another objection to this application; namely, that it does not appear to come from the sureties. They do not join in the application, and for any thing that appears, it is made by the defendant himself. In addition to these objections, the defendant has not pleaded

(*a*) 1 T.R. 624; *Reg. Mich.* 5 *W.* & *M.* note *b*; and see *Hockley* v. *Merry*, 2 *Stra.* 1043; *Hardw.* Rep. 262; *Perkins* v. *Pettit*, 2 *Bos.* & *Pul.* 440; *Tidd*, 6th ed. 295.

his certificate, and he cannot do it now, because the time for pleading is gone by, the cause being now set down for trial. If the certificate, which was obtained on the 15th of *July* last, is to be pleaded, it must be a plea since the last continuance. If, however, the defendant is entitled to the benefit of his certificate at *nisi prius*, he will not be injured by refusing this application. But the substantial objection to this motion is, that the bond entered into by the defendant is an absolute obligation to pay such sum as shall be recovered in the action.

Scarlett and *Wylde* in support of the rule. This case is clearly analogous to the common recognizances of bail in ordinary cases, and no injustice will be done to the plaintiff in making this rule absolute. Undoubtedly, if the plaintiff wish to contest the commission, the defendant can have no object in preventing it; but if the plaintiff is satisfied of the goodness of the commission, there can be no objection to this proceeding, because the certificate will be an answer to the action. It is true the condition of the bond is to pay such sum as shall be recovered; but at this moment the defendant is a certificated bankrupt, and he may plead his certificate. Suppose, as formerly in the case of outlawry, the bail enter into an absolute recognizance to pay, and before judgment recovered the defendant became bankrupt and obtained his certificate, it would have been held that the certificate was an answer to the action. So in the present case, it would be nothing to say, that the plaintiff if he recovers would be entitled to the benefit of the absolute obligation of the bond; because the certificate bars the action. It has been supposed, that bail in error are absolutely bound to pay the debt if the plaintiff recovers; but if that question should come before the Court again in a solemn manner, it would be found to be a matter of considerable

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doubt. In the present case, the bond does not differ in principle from the common recognizances of bail; for in both cases the liability depends upon the result. If the defendant has no answer to the action in either case, the consequence is in substance the same; and so if he has an answer. The plaintiff cannot recover in this action, unless he means to impeach the bankruptcy; for it is clear that he cannot recover if the certificate is pleaded. The Court, therefore, by this application, is only required to order that to be done directly, which may be done circuitously. The obligation of the bond is at present contingent, but its operation will be put out of doubt the moment the certificate is pleaded and proved, and in this respect the analogy between this case and that of bail generally is so strong, that the Court can have no difficulty in adopting that course in the present case. Any objection that may arise from the circumstance of the defendant not having pleaded his certificate, is not available here, because the Court on the authority of several cases would allow the defendant to plead the certificate after the last continuance, being matter of defence subsequently arising. It is unnecessary that the defendant should be at the expence of pleading until this application is disposed of. The plea is now ready to be filed, and therefore, under these circumstances, there can be no injustice done to the plaintiff unless he wishes to impeach the certificate.

ABBOTT Ch. J. I am of opinion, that this rule must be discharged. We cannot at the present moment try the effect or the validity of the plea *puis darrein continuance*. The ground upon which we discharge this rule is, that by the terms of the condition of this bond, the defendant is to pay the money *absolutely*, if the plaintiff succeeds. In that respect it is much more analogous to the case of bail in error, where

they cannot render the principal, than to the case of bail in an action, where the defendant may be rendered. It is upon that ground, that we think this rule must be discharged. What the effect of pleading the certificate may be, we do not decide.

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HOLROYD, J. and BEST, J. (*a*) were of the same opinion.

Per Curiam.

Rule discharged.

(*a*) *Bayley* J. was absent.

BOND *against* SMART.

Monday, Nov. 29th.

If defendant pleads a plea without taking declaration out of the office, it is a nullity, and waives the necessity for demand of plea, and plaintiff may sign judgment by default. (*a*)

CHITTY on a former day obtained a rule to shew cause why the interlocutory judgment signed in this cause, and all subsequent proceedings, should not

(*a*) In *Tidd's* Prac. 588. *Imp.* K. B. 279, it is laid down that before the plea is filed or delivered, the declaration must be taken out of the office, or the plaintiff may sign judgment. With respect to the demand of plea, where the defendant has entered an appearance, but has not taken the declaration out of the office, the practice of the C. P. seems to be different from that in this Court; for in *White* v. *Dent*, 1 *Bos. & Pul.* 311, the Court of C. P. on inquiry of the officers as to the practice, and having found a difference of opinion, held that although the defendant must take the declaration out of the office before he pleads, yet, that as he may take it out the very hour before he pleads, the plaintiff ought not to sign judgment without demanding a plea; and the Court in this case set aside the judgment. The rule to plead is not served upon the opposite party, for this reason—the practice of the Court requires that there should be a demand of plea. But where a rule to plead has been given, and a demand of plea made, and judgment is signed in a subsequent Term, there need not be a fresh demand of plea of that Term, although there should be a new rule to plead. *Sweet* v. *John*, *Hil.* Term, 55 *Geo.* 3, *Feb.* 14. Rule to set aside a judgment for irregularity. The irregularity complained of was, that there had been no demand of plea. A rule to plead had been given in *Trin.* Term, and then a demand of plea was made; but the plaintiff having been delayed by summonses for delivering particulars, the cause stood over till *Mich.* Term. In that Term the plaintiff gave a new rule to plead,

Where a rule to plead has been given, and demand of plea made, and judgment is signed in a subsequent

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be set aside, with costs, for irregularity; the irregularity being, first, that there had been no demand of a plea served in the cause; and second, that judgment was signed after a plea pleaded.

Comyn now shewed cause. The proceedings here are regular; first, because no demand of a plea was necessary until the defendant had appeared, which he had not, *Cook* v. *Raven*; (a) and second, because the defendant has pleaded before appearance, and before he has taken the declaration out of the office.(b) The declaration was filed in the office, and the defendant's attorney, in order to get rid of the necessity of paying the fees at the office for stamps, &c. writes to the plaintiff's attorney for a copy of the declaration, which the latter refuses, the declaration being then filed. This is a practice that is now become quite common, in order to prevent the payment of fees. The defendant then pleads without taking the declaration out of the office, and for that reason the plaintiff is entitled to sign judgment for want of a plea; and though his plea was a nullity, it nevertheless waived the necessity for a demand of plea. (c)

Term, there need not be a fresh demand of plea of that Term, though there should be a rule to plead.

and no plea being pleaded, signed judgment. *Espinasse* now moved to set aside the judgment, contending that there ought to have been a demand of a plea of the Term in which the rule to plead was given. He said that the second rule operated as a waiver of the first, and that there was as much occasion for a demand of plea when the second rule was obtained as there was on the first rule. *Comyn* contra. The *Court* held the judgment regular; and the Master, on being referred to, said it was regular: and the Court said, that when a rule to plead has once been given, and a demand of plea made, though there should be a rule to plead of the Term in which the judgment is signed, there is no necessity for a fresh demand of a plea of that Term. Here there was a rule to plead given in *Mich.* Term, of which Term judgment was signed. The judgment was therefore regular.

(a) 1 T. R. 635. (b) *Tidd*, 588, 6th ed.

(c) *Tidd*, 6th ed. 493. Where the defendant puts in a plea which is considered as a nullity, it operates in general as a waiver of the irregularity in not demanding a plea, and will enable the plaintiff to sign judgment for want of it.

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Chitty, contra. The substantial irregularity here complained of is, that the plaintiff has treated the defendant's plea as a nullity, which he had no right to do. The plaintiff no doubt may sign judgment if the defendant does not in fact plead; but if the defendant sees the declaration, there is no necessity for his taking a copy of it out of the office, to enable him to plead. It is sufficient if he have competent means of knowing what plea he ought to file or deliver, by looking at the declaration in the office. If this be clear, then all the authorities upon the practice of this Court say, that if the defendant enters an appearance, the plaintiff has no right to call upon him for a plea until a demand of plea has been regularly served. (*a*) The defendant is not obliged to take the declaration out of the office before the plaintiff is entitled to call upon him to plead. (*b*)

ABBOTT Ch. J. The practice certainly is, that the defendant has no right to plead without taking the declaration out of the office. He is bound to do that. If the defendant here has pleaded, he has pleaded irregularly. His plea amounts to a waiver of the necessity for a demand of plea. It however answers no purpose, and therefore the plaintiff is entitled to sign judgment.

HOLORYD J. (*c*) I am of the same opinion. The defendant must put himself in a situation to require the demand of a plea. What occasion is there for the opposite party to demand a plea, until the defendant has taken the declaration out of the office? Not having done so, the plaintiff has a right to treat the plea as a nullity, and sign judgment.

(*a*) *Tidd*, 6th ed. 492. The demand of a plea must be made in every case where the defendant has appeared. *Tidd*, 6th ed. 492; 1 *Wils*, 134; 1 *Bos. & Pul.* 341.

(*b*) *White* v. *Dent*, 1 *Bos. & Pul.* 341. (*c*) *Bayley* J. was absent.

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BEST J. The plea is pleaded here for the purpose of getting rid of the expence of taking the declaration out of the office. It would be absurd, therefore, for the plaintiff to demand a plea until that previous step was complied with. If the plaintiff gives the defendant a copy of the declaration, it is giving that which is worth nothing for this purpose.

Rule discharged with costs.

Monday, Nov. 29th.

SHEIRS *against* CARTER.

Plaintiff allowed to enter a *stet processus* on paying the costs of the application, on the ground that the defendant has become insolvent, although the rule for judgment, as in case of a nonsuit, had been discharged on his giving a peremptory undertaking, and the debt sought to be recovered was not included in the defendant's schedule and notice of discharge under the insolvent act. (*a*)

CHITTY on a former day obtained a rule to shew cause why the plaintiff should not be at liberty to enter a *stet processus* in this cause.

Knox now shewed cause, and contended that it was not competent to a plaintiff to move for a *stet processus*, and certainly could not be allowed under the circum-

(*a*) In *Baker* v. *Sydee*, 7 *Taunt.* 179, where the defendant, not having included the demand for which the action was brought, in his schedule and notice of discharge, ruled the plaintiff to enter the issue, and afterwards signed judgment of *non pros*, the Court refused to set aside the judgment, and *Gibbs* Ch. J. said, that if the defendant had armed himself against the proceedings of the plaintiff, by being discharged under the insolvent act, the Court would never allow him afterwards to take any step against the plaintiff, in regard to costs. But a debtor, by being discharged in other actions, does not thereby lose his power of proceeding for costs against a plaintiff whose right to recover he disputes, and to whom he has never given notice that he meant to be discharged from that debt. However, the insolvency of the defendant after action brought, is a good cause against judgment as in case of a nonsuit; but unless the plaintiff will consent to stay all further proceedings, and to enter a *stet processus*, the Court will bind him down to a peremptory undertaking. *Bailey* v. *Wilkinson*, *Douglas*, 3d ed. 671; *Tidd*, 6th ed. 824; 7 *Taunt.* 180. Where the plaintiff had held out to the defendant that he would settle the cause, the Court discharged the rule for judgment as in a case of nonsuit, on the plaintiff's undertaking alternatively either to pay costs, or to enter a *stet processus*. *Anon. Hill.* T. 1814.

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stances of this case. The action was brought for 13*l*. 15*s*.; the issue was delivered in *Easter* Term last, and notice of trial was given for the Sittings after that Term. The plaintiff, however, not having proceeded to trial, a motion was made on the part of the defendant in *Trinity* Term for judgment as in case of a nonsuit; and then the plaintiff gave a peremptory undertaking to try at the Sittings after that Term, which he did not do, for the reason now assigned, namely, that the defendant had taken the benefit of the Insolvent Debtors' Act. The affidavit now produced on the part of the defendant did not deny this fact, but stated that he had not included the plaintiff's debt in his schedule, because he had a good ground of defence to the action. There was therefore no reason for entering a *stet processus*; and the justice of the case was, to give a judgment for the defendant as in a case of a nonsuit, in consequence of the plaintiff not having proceeded to trial, pursuant to his peremptory undertaking.

Chitty, in support of his rule, said he was not aware of any novelty in this application. It was true the plaintiff had given a peremptory undertaking to try at the Sittings after last Term, but the defendant being then insolvent, he declined proceeding, as he could obtain no benefit by trying the cause under these circumstances, therefore it was mercy to both parties to enter a *stet processus*.

ABBOTT Ch. J. If this had been a motion for judgment as in case of a nonsuit, most likely under the circumstances now stated, we should have ordered a *stet processus* to be entered. I think now we ought to order a *stet processus* on the plaintiff's paying the costs of the present application.

Rule absolute accordingly.

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Monday, Nov. 29th.

A prisoner discharged under the Lord's act was allowed to be retaken in execution, for want of notice to the plaintiff, although more than a year had elapsed since the time of his being discharged. (a)

GILLAN *against* BARTLET.

ON a former day a rule to shew cause why the plaintiff should not be at liberty to retake the defendant in execution, after he had been discharged under the Lords' act, was obtained upon an affidavit, stating that the plaintiff had never been served with any notice of the defendant's intention of taking the benefit of that act.

Abraham now moved to discharge the rule, upon an affidavit, stating that the defendant had been a prisoner in the King's Bench prison, and had been discharged under an order of this Court on the 18th of *Nov.* last year. Previous to his discharge, he had instructed a person, acting as an agent to insolvent debtors, to give the necessary notices and prepare his schedules, for which purpose he was supplied with the necessary materials, and that he verily believed the said agent had duly acted in pursuance of those instructions. He did not swear that the plaintiff had been served with a notice; but it was now submitted, that after the defendant had been at large for more than twelve months, without any objection taken to his discharge until now, the Court would hardly put him to the necessity (if it were possible to accomplish it) of finding out the person who was supposed to have served the plaintiff with the notice.

ABBOTT Ch. J. The Court has, unfortunately, on more occasions than one, had reasons to suspect that

(a) The statute 32 *Geo.* 2, c. 28, enacts, that every such prisoner shall give or leave for every creditor at whose suit he shall stand charged in execution, or his executors, and at his usual place of abode (or to or for his attorney or agent last employed in the cause, if the creditor cannot be met with, but not otherwise), fourteen days at least before such petition shall be presented and received, a notice in writing, signed with the proper name or mark of every such prisoner, importing that he intends to petition the Court from which the process issued, &c.

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great fraud is practised as to the manner in which affidavits are made of the service of notices of this description. It is now positively sworn, that the notice never was served upon the plaintiff, and that no such person as the man who made the affidavit of service, originally, can be found. It appears also that the expedition with which the man must have travelled from one place to another is altogether incredible. I therefore think that the rule for retaking the defendant in execution must be made absolute.

Marryatt for the plaintiff.

The original rule absolute accordingly.

THE KING *against* THE SHERIFF OF MIDDLESEX, IN A CAUSE OF —— V. ——

Nov. 29th.

A notice of exception to bail not entitled in the cause is a nullity, although served upon the defendant's attorney at the same time with the declaration; and an attachment may issue against the Sheriff. (*a*)

READER on a former day moved to set aside the attachment against the Sheriff in this case, for irregularity.

The defendant was arrested upon a special *capias* on the 9th of *Nov.* and on that day he put in special bail. The body rule would not expire until the 17th, and on the 15th the defendant gave notice to the plaintiff's attorney that bail would be added in the cause. On that day the plaintiff's attorney entered notice of exception in the filazer's book, and in the course of the same day delivered a declaration to the defendant's attorney, and at the same instant delivered a notice of exception to the bail in the following terms:—" In the King's Bench, *Mich.* Term, 60 *George III.* Take notice, that I have excepted to the bail (naming them)

(*a*) In *Prime* v. *Nicholson*, 5 *Taunt.* 337, an affidavit to verify a plea, pleaded *puis darrein continuance*, was held sufficient, though it had no title, because it referred to the plea to which it was annexed. See also as to this point, *Anon. ante*, 374, and note; and *Tidd*, 261, as to the notice of exception to bail.

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THE KING *against* THE SHERIFF OF MIDDLESEX, IN A CAUSE OF —— v ——

for the defendant, put in in this cause." There was no title of the cause given in the notice. The defendant's attorney told the clerk at the time that the notice was good for nothing, not being entitled in any cause; and having disregarded the notice, the plaintiff attached the Sheriff for not bringing in the body, and the question was, whether such notice of exception was valid.

Andrews shewed cause against the rule for setting aside the attachment, and contended that the notice of exception was good, having been delivered to the defendant's attorney at the same instant of time with the declaration.

ABBOTT Ch. J. I am clearly of opinion, that the notice of exception in this case is a mere nullity. This is an attachment against the Sheriff. He is not liable unless you have duly served a written notice of exception in the cause. Is the Sheriff to be liable to an attachment, because the attorney in the cause is guilty of an irregularity? The notice of exception must be a perfect instrument in itself—and the mere delivery of a notice, not entitled in any cause, with a declaration, is not sufficient. We ought not to encourage a plaintiff under these circumstances, because the step he takes almost inevitably leads to some application to the Court.

BAYLEY J. If the defendant in the cause was to waive any notice of exception to the Sheriff, the plaintiff could not have an attachment against the Sheriff. The Sheriff is not to be prejudiced by the acts of the parties to which he himself is not a party.

BEST J. (*a*) The notice of exception here is not a notice in any cause, and therefore the attachment is clearly irregular.

Rule absolute.

(*a*) *Holroyd* J. was absent.

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Monday, Nov. 29th.

JONES *against* KNIGHT.

Judgment cannot be entered up upon an old warrant of attorney without an affidavit of the attesting witness, or an affidavit verifying his handwriting. (*a*)

COMYN moved to enter up judgment on an old warrant of attorney, without an affidavit of the attesting witness to the execution of it; but he produced an affidavit verifying the hand-writing of the defendant, and an acknowledgment on his part of his signature. This he submitted was sufficient without the affidavit of the subscribing witness.

ABBOTT Ch. J. That will not dispense with the necessity of an affidavit on the part of the attesting witness. In an action upon a bond, proof of the acknowledgment by the defendant that it is his deed, will not do. If an affidavit is produced, verifying the handwriting of the attesting witness, and that he cannot be found, perhaps then the Court will relieve you.

Rule refused. (*b*)

(*a*) Vide *Appleton* v. *Bond*, next case; *Barnes* v. *Trompowshid*, 7 T. R. 267; 4 *Taunt.* 132; *Tidd*, 6th ed. 579, 580.

(*b*) But if the defendant, for the purpose of dispensing with the production of the attesting witness, agree to acknowledge the warrant of attorney, "so as to enable the *conusee* to enter up judgment thereon," the Court or a Judge will allow judgment to be entered up without an affidavit of the execution by the subscribing witness. *Laing* v. *Kaine*, 2 *Bos. & Pul.* 85; *Tidd*, 579, 580; but if the circumstances which prevent the production of an affidavit of the subscribing witness are made appear to the Court by affidavit, and the endeavours made to find him are stated, the Court will allow the execution to be verified by secondary evidence. See *Appleton* v. *Bond*, next case. If the subscribing witness will not join in the necessary affidavit, the Court will compel him by rule so to do. *Weston* v. *Faulkner*, 1 *Price's* Rep. 308; *Clark* v. *Elwich*, 1 *Stra.* 1.

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Monday, Nov. 29th.

APPLETON *against* BOND.

Judgment cannot be entered up upon an old warrant of attorney without an affidavit of the attesting witness to its due execution, and the acknowledgment of the defendant does not obviate the objection. But where the attesting witness is out of the jurisdiction of the Court, an affidavit verifying his hand writing would be sufficient to found a motion for judgment. (*a*)

MANNING moved to enter up judgment upon an old warrant of attorney, the party being alive within the Term, without the usual affidavit of the attesting witness, or an affidavit verifying the hand-writing of the latter, which defect was accounted for by the circumstance, that the attesting witness was abroad, and out of the jurisdiction of the Court. There was an affidavit however, which stated an acknowledgement on the part of the defendant of the execution of the warrant of attorney.

PER CURIAM. Is there any instance in which judgment has been allowed to be entered up on a warrant of attorney, without the affidavit of the attesting witness? The acknowledgment of the warrant of attorney by the defendant does not wave the objection; for it is held in *Douglas*' Reports, (*b*) that the acknowledgment of a bond does not dispense with calling the subscribing witness. It is said, that here the attesting witness is out of the jurisdiction of the Court; but the want of his affidavit is not supplied as it might be, by an affidavit verifying his hand-writing. Nothing is got by the attesting witness unless his hand-writing is proved.

Rule refused.

(*a*) Vide *Jones* v. *Knight*, and note thereof, *ante*, 743.

(*b*) *Abbott* v. *Plumble*, *Doug*. 216; *Barnes* v. *Trompowshid*, 7 T. R. 26; 4 *Taunt*. 132.

Monday, Nov. 29th.

BAILY *against* JONES.

The Court will not, on the last day of Term, stay proceedings nor grant a rule *nisi* for an attorney to answer the matters of an affidavit, or hear cause shewn against such latter motion. (*a*)

CAMPBELL moved for a rule to shew cause why the interlocutory judgment signed in this case, should not be set aside for irregularity, and why in

(*a*) See *Jacob's* case, 4 *Burr*. 2502; *Tidd*, 6th ed. 522. The same rule

the mean time, proceedings should not be stayed, and why the plaintiff's attorney should not answer the matters of the affidavit. But

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BAILY *against* JONES.

The COURT said he might take the first part of his motion, but refused the rest, it being quite contrary to the practice to grant a motion on the last day of Term, for a stay of proceedings, and to call upon an attorney to answer the matters of an affidavit.

prevails with respect to motions for quashing indictments or for staying proceedings, 1 *Burr.* 651; and to motions for attachments, *Anon.* 3 *Smith's* Rep. 118; and for setting aside awards, *Nettleton* v. *Crosby*, *Tidd*, 6th ed. 522. So on this day, in *Cass* v. *Niblett*, gent. the Court would not, upon rule *nisi* obtained by *Gurney* on a former day, calling upon the defendant an attorney, *inter alia*, to shew cause why he should not answer the matter of an affidavit, permit *Chitty* for the defendant to shew cause, declaring that such a motion could not be discussed on the last day of the Term, and the rule was enlarged till next Term.

KING *against* FARRANT.

Monday, Nov. 29th.

Where a coroner's inquest has been irregularly assembled and afterwards adjourned, the Court will not compel the coroner by *mandamus* to proceed with the inquisition. A coroner, who is a judicial as well as a ministerial officer, cannot appoint a deputy to hold an inquest. The jurisdiction of a coroner is only *super visum corporis*; and the view of the body must be taken by the jury and the coroner at the same time. Where a coroner's clerk, in the absence of his principal, summoned a jury and charged them *super visum corporis*, and examined witnesses, and after sitting several days the coroner himself proceeded in person with the inquest, and afterwards had a view of the body without the presence of the jury, and then proceeded with the inquest without reswearing the jury or the witnesses previously examined, it was held, that the proceedings were altogether illegal, and that an inquisition found under such circumstances might be quashed. (*a*) In executing an inquiry, the under-sheriff, and not his deputy, should administer the oath to the jury.

DENMAN, on a former day, moved for a rule to shew cause why a *mandamus* should not issue to the defendant, one of the coroners for the county of *Lancaster*, to proceed with an inquisition touching the decease of one *John Lees*, who was supposed to have come to his death by violence, in consequence of a

(*a*) See *Impey's* Office of Coroners, 3d ed. 438, S. P.; *Hawkins*, P. C. B. 2, *c.* 9.

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public tumult at *Manchester*, on the 15th of *August* last.

The circumstances of the case were these :—In the beginning of *September* last, the deceased died in the township of *Oldham*; and in consequence of a rumour that he had come to his death by violent means, the constable of the township went to the house of the defendant, for the purpose of receiving his instructions to hold an inquest; but the defendant being absent from home, attending the assizes, he communicated with the clerk of the latter, who immediately summoned a jury from the four surrounding townships, and he and the jury went together to take a view of the body; and having so done, the usual oath was administered to the jury by the clerk, and several witnesses were sworn and examined as to the cause of the death of the deceased. After several days' inquiry, the defendant returned from the assizes, and proceeded with the inquest in person, not having then seen the body of the deceased. Some days afterwards, the propriety of seeing the body being suggested to him, he caused it to be disinterred, and went alone and had a view of the face only of the deceased. He then resumed the inquisition without re-swearing the jury, and without re-swearing and examining the witnesses who had previously been sworn and examined. Circumstances afterwards occurred which occasioned the adjournment of the inquest from *Oldham* to *Manchester*, where the proceedings were continued until the 13th of *October* last, when it was further adjourned until the 1st of *December* next, in consequence of the coroner being required by the legal adviser of the friends of the deceased, to inquire into matters which he conceived not relevant or pertinent to the subject matter of the inquest. Under these circumstances the present application was made.

Cross Serj. and *J. Williams*, on appearing to shew cause against the rule upon the merits, were stopped by

The COURT who called upon the other side to shew that the inquest had been legally held at the commencement; or if not, that what had subsequently taken place, cured any defect in the prior part of the proceedings, suggesting,—first, that it was not competent for a coroner to hold an inquest by a deputy; and secondly, that it did not appear that the coroner himself, when he acted in person, held the inquest *super visum corporis.*

Denman and *Tindal*, in applying themselves to these points, said they were taken rather by surprise, not anticipating any objection to the manner in which the inquest had hitherto been holden: but they submitted, that the manner of holding the inquest was regular and legal. A coroner is both a judicial and a ministerial officer—judge for the purpose of taking the evidence, and sheriff for the purpose of summoning the jury. If he cannot appoint a deputy to fulfil his judicial duties, he at least may appoint a deputy to fulfill his ministerial duties, provided he be a proper and sufficient person; and therefore the jury in this case were well summoned in the first instance by the coroner's clerk. The law requires that the inquest shall be holden *super visum corporis;* but that must be taken to mean, that the jury only shall have a view of the body. If that be so, then this requisite was complied with in the present instance, for the jury had a view of the body of the deceased before the witnesses were examined. But supposing it to be necessary, that the coroner himself should also have a view of the body, that requisite seems also to have been sufficiently complied with in the present case, the coroner having caused the body

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of the deceased to be disinterred, for the purpose of taking a view. It is not requisite that the coroner and the jury should have a view of the body, at one and the same time. It is sufficient if, in point of fact, the jury and the coroner have seen the body severally, before the inquest is found. The statute *de officio coronatoris*, 4 *Ed.* 1. *St.* 2, says nothing in express terms as to a view of the body. There is nothing in that statute which makes it absolutely essential that he should see the body. If he goes to the spot where the body is lying, he does all that the statute requires, which is to summon the jury from the four neighbouring townships, and the jury having seen the body, that is sufficient foundation for them to form an opinion upon the evidence which is laid before them as to the cause of the death. Unless, therefore, there is an express holding to the contrary of this, it would be too much for the Court to say in this late stage of the proceedings, that the coroner had acted illegally. Admitting, however, that the statute *de coronatoris* requires a view of the body, still what had taken place in this case was in substance and effect a compliance with the statute. Out of a hundred inquisitions taken before the coroner, it would be found, that in by far the greater part of them, the jury are first assembled by a deputy, and afterwards the coroner attends in person to receive the evidence. The administration of the oath to the jury is merely a ministerial act, and almost in every case, where a writ of inquiry is executed before the under sheriff, the oath is administered by the bailiff or other dependant officer. [ABBOTT Ch. J. If that be so, it is very irregular. BAYLEY J. The oath is generally administered by the under-sheriff, and it ought to be so.] In point of strict regularity, perhaps it ought, but where it is not, it would be intended to be the act of the under-sheriff himself. In the present case, the Court will not at all events refuse the *mandamus*, for if the inquest

has been illegally summoned and holden, the coroner may make that his return to the writ.

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ABBOTT Ch. J. If it is perfectly clear that this jury was in the first instance unlawfully assembled, the Court certainly will not grant a *mandamus* to the coroner, to compel him to proceed in the inquiry; because the result would be this, that if he should proceed, whatsoever the finding of the jury might be, the inquisition must be quashed, as being void and contrary to law. Now it is said in *Hawkins'* P. C., that when a person comes to an unnatural death, the body shall not be interred until a coroner's inquest is holden, otherwise the body is to be interred. In 2 *Hawkins'* P. C. it is further said, that when the coroner receives notice of a violent death, which regularly ought to be from the peace-officer of the parish, or place where the body lies dead, he is then to issue his precept or warrant to summon a jury to appear before him at such place, and the jury is to be sworn and charged by the coroner to inquire on the view of the body, how and by what means the deceased came by his death. The inquisition of the death is to be taken on view of the body, and not otherwise; because if the body be interred, he may dig it up if he can find it, in order to hold the inquest. If the body cannot be found, or is so putrified that a view would be of no service, then the inquest shall be taken by Justices of the peace. The jury being sworn on the view of the body, they shall inquire upon their oaths, in the manner required by the statute *de officio coronatoris*, 4 *Ed.* 1, st. 2, which requires in express terms, "That the coroner, upon information, shall go to the place where any be slain or suddenly dead or wounded." Then in the same book is given the form of a coroner's address to the jury when he administers the oath: "You shall diligently inquire, and true presentment make of all such matters and things, as shall be here given you in

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charge, on behalf of our Sovereign Lord the King, touching the death of *A. B.* here lying dead, of whose body you shall have the view; you shall present no man for hatred, malice, or ill will, nor spare any through fear, favor, or affection, but a true verdict give according to the evidence, and the best of your skill and knowledge." That oath imports, that the body of the deceased is present before the jury; and the coroner's inquisition, when found, sets out with stating, that the inquest was held "upon the view of the body of *A. B.*, and on the oaths *A. B. C.* &c." Therefore, taking the whole of these authorities together, and referring to the very words of the statute *de officio coronatoris*, it seems to me that the inquest cannot be holden, unless the jury and the coroner be present together *super visum corporis*. The oath is then administered to the jury by the coroner. It cannot be sufficient for some other person to come and say, that he is clerk to the coroner, and call the jury together of his own mere authority, and then proceed to hold the inquest. If in the course of the proceedings in this case, the jury and the coroner had been together at the time the body was disinterred, and the jury had then seen the body, and had been sworn afresh by the coroner in person, that would be a different thing; but that was not done. It seems to me, that the jury were never well or lawfully assembled, and that if the inquisition was to go on, it would be a void inquest; not having been held in the way which the law requires. That being so, we shall not order the coroner to go on. What further proceedings may be had, we are not called upon at present to decide.

BAYLEY J. I am of the same opinion, and I entertain no doubt whatever upon the case; for whether we look to the words of the statute *de officio coronatoris*, the words of the oath administered to the jury, or the

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invariable form of inquisitions in these cases, it seems to me, that the matter is beyond all doubt. The words of the statute are, "That the coroners, upon information, shall go to the place where any be slain or suddenly dead or wounded. Then they are to go to the dead body—Who? Why the coroner is to go, and after that the jury is to be sworn. Now the coroner is a known law officer, and part of his duty is judicial. It belongs to his office, and to his office only, to administer the oaths. The jury cannot properly be charged or sworn by any body but by him. Here the jury was not sworn by the coroner at the proper time of swearing. The jury are to be sworn by the coroner upon view of the body, he himself having a view at the same time. The form of the oath given in *Burn's* Justice, imports that such must be the case. Now in this instance, on the 8th of *September* an oath is administered to, and the body is seen by those persons, who afterwards act as jurymen; but the oath is administered by a person who had no authority whatever to administer an oath. It is a mere extrajudicial and gratuitous oath, not producing on the minds and consciences of those to whom it is addressed, that legal obligation, which an oath judicially and properly administered is calculated to produce, and is considered by the law as producing. Then the jury not being at that time under the proper obligation of an oath, and being in effect mere strangers, they continue their inquiry until the 24th of *September*, when the coroner has an opportunity of seeing part of the body. The body is not seen by the jury at that time, nor are the jury ever sworn by the coroner *super visum corporis*. The form of an inquisition is always in these terms: "An inquisition intended and taken at such a place, before *A. B.* one of the coroners of the county of —— upon view of the body of *A. B.*, lying dead, upon the oaths of such and such persons;" and the form of the oath is, "You are sworn to inquire of the death of

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A. B. here lying dead." That implies that the dead body is to be there at the time the jury are sworn. In this case the jury were not properly sworn—I believe never properly sworn; certainly their swearing on the 8th of *September*, was not a proper swearing. This Court would be doing great injustice, if they were to direct the coroner to go on with the prosecution of an inquiry, which was never legally commenced, and never legally proceeded in. For these reasons it seems to me, that from the beginning to the end, this has been an irregular proceeding, and that the Court have no authority to compel the coroner to go on with the inquest.

HOLROYD J. I am also of the same opinion, that the writ of *mandamus* ought not to be granted, inasmuch as no authority has been cited to justify the conduct of the coroner. It is stated, that if the inquest has been illegally summoned, the coroner may return that to the *mandamus*. But suppose the coroner does not chuse to make any return, and proceeds with the inquisition, administering oaths which by law he is not entitled to do, and taking evidence affecting third persons, are we under such circumstances to leave it to the discretion of the coroner, whether he will make any return to the *mandamus* or not, when we are now satisfied that his proceedings are irregular? It seems that at first, the coroner's clerk called the jury together, and had with them a view of the body. But he was not a person who had any authority to proceed in that way, nor does it appear to me that he was a person who could take any part in the inquest; for it is stated by *Hawkins* in his Pleas of the Crown, that no one can take an inquest in any case, but the coroner. But however, the coroner does afterwards proceed in person with the inquiry, and before he has any view of the body himself. Now although the statute *de officio coronatoris* does not in distinct terms say that the coro-

ner shall take his inquest on view of the body, yet it is expressly laid down by *Hawkins (a)* that the inquest must be taken on view of the dead body, and that an inquest otherwise taken by the coroner, is void. Now here some of the witnesses were sworn before the coroner had a view of the body; and unless there be a view of the body, the whole is extra-judicial, for the coroner has no jurisdiction on the inquest except *super visum corporis*. Although he afterwards had a view, yet the jury were not present on that occasion, nor were they sworn afresh. If they had been sworn again, and the coroner had re-examined all the witnesses upon fresh oaths, taken after he had acquired a jurisdiction, then the proceedings would be less objectionable. But I take it to be clearly irregular for the jury to go on and determine upon evidence given by witnesses before the coroner had jurisdiction to swear them, and before the jury were themselves sworn by the coroner in person, he alone having competent authority for that purpose. I think, therefore, that the Court cannot grant a *mandamus* under these circumstances. No injustice will be done by this refusal, because it is open to the parties to inquire of the death of the deceased by a commission appointed for that purpose, or by the grand jury of the county.

BEST J. As it appears to be quite clear that this inquest was irregularly commenced and proceeded in, I think there is no doubt that we ought not to grant a *mandamus* to compel the coroner to go on. I am of opinion that there are innumerable irregularities in this case, which would prevent the inquest assembled from finding a verdict. It does not appear to be necessary to decide the question, whether a coroner can appoint a deputy or not; for even if he can, this is not a legal proceeding by the coroner's deputy. From the facts

(a) *Hawk.* P. C. B. 2, c. 9, s. 23.

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disclosed in the affidavits, it appears that this person swears the jury and takes a view of the body. If that was a proper proceeding on his part, he should have gone on to the end of the inquiry, and the principal should not have interfered; instead of which the jury go on for some days, and then the coroner comes in himself and takes up the business which the jury had already begun, and he proceeds to examine more witnesses before the jury sworn by his deputy. After several days have elapsed, it is suggested to the coroner that he had not taken a view of the body, and consequently that he had no jurisdiction to proceed. Upon which he causes the body to be disinterred, and then he contents himself merely with a view of its face. It is quite clear that all these proceedings, from first to last, are irregular. The time at which the coroner takes his view is clearly irregular, because the jury is sworn before another person who had not authority to administer an oath. Nothing is more clearly established, than that no inquest can be held except *super visum corporis*—that is a first principle. It is clear that the coroner had no authority to proceed with the inquest without seeing the body. Then it is suggested that he did see the body—for what? to give him a jurisdiction which he had not before. But then, are the jury to find a verdict upon testimony which they could not take before? In what manner does he take a view of the body? He goes by himself, without a single juryman attending him: but then it is said not to be necessary for the coroner and the jury to go together. As well might it be said, that the judge might hear the evidence at one time and the jury at another, in every cause tried in a Court of Justice. The very object of requiring the attendance of the coroner and the jury at the time the view is taken is, that the jury may have the benefit of hearing such observations made to them as the experience of the coroner may suggest for their

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information. The language of the statute of *Edward* is decisive upon the subject; but common sense would point out the objection, without any assistance from the statute. But supposing it not to be necessary that the coroner should have a view of the body at the same time with the jury, has the coroner in this instance removed the difficulty? He merely sees the face, and no further. Can that be considered as a view of the body to answer the purposes of justice? He is to see the body for the direction of the jury to find a proper verdict. Merely looking at the face of the body after it has been buried a great many days, cannot be sufficient even for this purpose. But I should not have thought it of so much importance for the coroner to see the body at the same time with the jury, if after having exhumed it and viewed it, he had then gone on regularly. What does he do? He goes on to examine fresh witnesses before a jury not sworn by himself. He does not reswear the jury, nor does he reswear the witnesses, who had been previously examined before his deputy. Upon this ground alone it appears to me that the proceedings are illegal, and that we cannot grant a *mandamus* to continue an inquisition, which in the result must be quashed.

Rule discharged.

END OF MICHAELMAS TERM.

REGULA GENERALIS.

Trinity(a) Term, 59th Geo. III.

It is ordered, that from and after the last day of this Term, every notice for justifying bail in person shall be served before eleven o'clock in the forenoon of the day on which according to the present practice such notice ought to be served; except in case of an order of the Court for further time, in which case it shall be sufficient to serve the notice before three o'clock in the afternoon of the day on which such order shall be granted; and in all the cases aforesaid, the affidavit of service shall specify the time of day at which such notice shall have been served.

By the COURT.

(a) By mistake, this was not inserted in the preceding number

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W. Pople, Printer, 67, Chancery Lane.